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THE
Ecclesiastical Law.

BY
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CHANCELLOR OF THE DIOCESE OF CARLISLE,
AND VICAR OF ORTON, IN THE COUNTY OF WESTMORELAND;
AUTHOR OF "THE OFFICE AND DUTY OF A JUSTICE OF THE PEACE."

The Ninth Edition,
CORRECTED; WITH CONSIDERABLE ADDITIONS,
INCLUDING THE STATUTES AND CASES TO THE PRESENT TIME;

BY
ROBERT PHILLIMORE,
ADVOCATE IN DOCTORS' COMMONS, BARRISTER OF THE MIDDLE TEMPLE, OFFICIAL
TO THE ARCHDEACONRIES OF LONDON AND MIDDLESEX, AND
LATE STUDENT OF CHRIST CHURCH, OXFORD.

["Omnes legibus regantur etiam si ad divinam domum pertineant."—Cod. l. i. tit. xiv. s. 10.

"Certain it is, that this kingdom hath been best governed, and peace and quiet preserved, when both parties, that is, when the justices of the temporal courts and the ecclesiastical judges, have kept themselves within their proper jurisdiction, without encroaching or usurping upon one another."—LORD COKE, 3 Inst. 321.]

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ADDENDA ET CORRIGENDA

TO

VOL. IV.

Vacation.

- 4.—A very important decision, that the 28 Hen. 8, c. 11, remains still in force, was given in the Court of Exchequer, Wednesday, April 27, 1842, (sittings in banco, before Lord Abinger.) Special paper. *Dakins, clerk, v. Leaman, clerk.* It was an action in which the plaintiff sought to recover the sum of 150*l.* under the following circumstances: The father of the plaintiff was the rector of St. James's parish in Colchester, and at his death the plaintiff, who was then in holy orders, was requested by the sequestrators appointed by the Bishop of London, *ad interim*, until the living should be filled up, to undertake the cure of the parish. The rev. gentleman accordingly took upon himself the duties of curate, which he discharged from week to week for some time, until the defendant was appointed to the living. Having demanded remuneration from the defendant, which was refused, the plaintiff was obliged to bring this action. The defendant, in answer thereto, put on the record several special pleas, to which the plaintiff demurred as being insufficient in law to bar his claim. The defence rested mainly on the fact that the plaintiff had not been regularly licensed to this duty by the Bishop of London, it being contended that such was a necessary condition to his right to recover; while it was further urged that the plaintiff's right, which was founded on the Act of Uniformity of Henry VIII., was barred by the recent statute of 1 & 2 Vict. c. 106. On both these points the court, at the close of the case, pronounced its unanimous opinion in favour of the plaintiff. As to the operation of the recent statute upon that of Henry VIII., it was enough to say that it could only bar the plaintiff by express enactments, of which there were none to be found in it, and as it did not appear that the plaintiff's appointment was of a permanent character, it was clear that no licence was necessary. His appointment by the sequestrators was evidently only of a temporary kind, and one which there needed no authority from the bishop to enable him to accept. Under these circumstances, the judgment of the court must be in favour of the plaintiff. Judgment accordingly. (*Quære*, whether the action should not have been brought by the *Sequestrators*.)

Visitation.

- 30.—line 16, for "5 & 6 Geo. 4," read "5 & 6 Will. 4."

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THE ECCLESIASTICAL LAW.

Vacation (a).

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I. Who shall have Profits during.

[MR. Serjeant Stephen observes (b) (reciting in part the language of Blackstone), "It is only in an estate *per auter vie* that our law affords an example of the title by *occupancy*. It is difficult at least to put any other instance wherein there is not some owner appointed by the law. In the case of a sole corporation, as a parson of a church, when he dies or resigns, though there is no *actual* owner of the land till a successor is appointed, yet there is a *legal potential* ownership subsisting in contemplation of law; and when the successor is appointed, his appointment shall have a retrospect and relation backwards, so as to entitle him to all the profits from the instant that the vacancy commenced."—ED.]

Who shall
have the Pro-
fits during the
Vacancy of
a Benefice.

By the common law of the church, the profits of the vacation were to be laid out for the benefit of the church, or reserved for the successor; but by special privilege or custom, the bishop or archdeacon might have the same, or some part thereof; so also, it is said, the king might take the profits of a free chapel, and the patron of a donative the profits of such donative, during the time of vacation (c).

But by the statute of the 28 Hen. 8, c. 11, it is enacted as followeth: viz. "Forasmuch as in the statute for the payment of first fruits, it is not declared who shall have the fruits, tithes,

(a) [The history of the ancient ecclesiastical law upon this subject will be found in Thomassin's *Vetus et Nova Ecclesiæ Disciplina*, i. 2, c.

51, "De spolio et de statu rerum ecclesiæ sede vacante."—ED.]

(b) [Stephen's *Comm.* vol. i. 418.]

(c) Lind. 137; Gibs. 749.

and other profits of spiritual promotions, offices, benefices and dignities, during the time of vacation thereof; divers of the archbishops and bishops of this realm have not only when the time of the taking of tithes hath approached deferred the collation of such benefices as have been of their own patronage, but also have upon presentations of clerks made unto them by the just patrons deferred to institute, induct, and admit the same clerks, to the intent that they might receive to their own use the same tithes growing and arising during the vacation: so that through such delays (over and above the first fruits) they have been constrained to lose all or the most part of one year's profits, to their great loss and hindrance: it is therefore enacted, that the tithes, fruits, oblations, obventions, emoluments, commodities, advantages, rents, and all other whatsoever revenues, casualties, and profits, certain and uncertain, belonging to any archdeaconry, deanry, prebend, parsonage, vicarage, hospital, wardenship, provostship, or other spiritual promotion, benefice, dignity or office, growing or coming during the time of vacation, shall belong to such person as shall be thereunto next presented, promoted, instituted, inducted, or admitted, towards the payment of his first fruits."

"And if any archbishop, bishop, archdeacon, ordinary, or any other person or persons to their uses and behoof, shall receive or take the same, and shall not upon reasonable request render the same to the next incumbent lawfully instituted, inducted or admitted, or shall let or interrupt the said incumbent to have the same, he shall forfeit treble value, half to the king and half to the incumbent, to be recovered in any of the king's courts."

To such Person as shall be thereunto next presented, promoted, instituted, inducted, or admitted.]—In order to receive the benefit of this clause, it is not absolutely necessary that the clerk be presented by the lawful patron; but if he get institution and induction, though he is afterwards removed by *quare impedit*, he, and not the clerk who comes in upon such removal, shall have the profits of the vacation. And the reason is, because till he is removed he is incumbent *de facto*, and as such is liable to all burdens and duties, and is therefore in reason and equity entitled to all the profits (*d*).

But in cases where the institution and induction are declared by law to be *ipso facto* void (as in case of simony, or the like), there the church having been really never full since the death of the foregoing incumbent, and by consequence the vacancy still continuing, there the profits of course shall pass to him who shall be next presented, instituted, and inducted (*e*).

But though the church doth become void by the omission of

(*d*) 1 Roll. Rep. 62; Gibs. 749; 4 Vin. Abr. 495. (*e*) Gibs. 749.

some subsequent duty to be performed, yet having been full by institution and induction, and the person thereby liable to the payment of first fruits, he shall not lose the profits of the vacation; only the profits from the time of such avoidance *ipso facto* will go to the next incumbent, as profits of the vacation, which commenceth from thence (*f*).

Inducted or admitted.]—This cannot be understood disjunctively, as if presentation or admission (without institution and induction) entitled the successor to the profits of the vacation; but admission here (coming after induction) was plainly added, to include those preferments which are not taken by institution and induction. And although in preferments which are so taken, institution gives a right to enter upon and take the profits as well of the vacation as others; yet that which alone can give a right to sue for them, is induction (*g*).

Anciently upon the death of an incumbent, without any formal sequestration, the rural dean was to take the vacant benefice into his safe custody, and to provide for the necessary cure of souls; and to take care that the glebe land was seasonably tilled and sowed, to the best advantage of the successor, to whom they were to give up the intermediate profits, and be allowed their necessary charges, which upon dispute were to be moderated by the bishop or his official. But the canon lawyers in process of time deprived the country deans of this, as well as of all other parts of jurisdiction; and the chancellors of bishops, or their archdeacons, laid claim to the custody of vacant churches, and by forms of sequestration assigned them over to the *œconomi*, or lay guardians of the church (*h*).

Sequestration
issued, on a
Benefice be-
coming void.

For now, the ordinary way of managing the profits of vacation is by sequestration granted to the churchwardens. Upon consideration of which, Dr. Watson and Dr. Gibson take occasion to wish, that some of the neighbouring clergymen might be appointed, and would take upon them the trouble of that office, in inspecting and managing the profits, and of supplying or providing for the cure; and that the ordinary, in granting patents, would not convey to chancellors, commissaries, or officials, the right of granting these sequestrations, in times of vacation, but would reserve it to their own immediate cognizance; since it is a point in which the interest of the church and clergy, and also the immediate care of souls for the time, are so nearly concerned (*i*).

The churchwardens, having taken out a sequestration under the seal of the office, are to manage all the profits and expenses of the benefice for the successor; to plough and sow the glebe, gather in tithes, thresh out and sell corn, repair houses, make up his fences, pay his tenths, synodals, and procurations, and what other things are necessary during the vacation.

Management
of the Profits.

(*f*) Gibs. 749.

(*g*) Ibid.

(*h*) Ken. Par. Ant. 647.

(*i*) Gibs. 749.

But the sequestrators cannot maintain an action for tithes in their own name, at common law, nor in any of the king's temporal courts; but only in the spiritual court, or before the justices of the peace in such cases as the law empowers them to hear and determine (*k*).

Thus in the case of *Berwick v. Swanton*, T., 1692 (*l*), it was resolved, that a sequestrator cannot bring a bill alone for tithes; because he is but as a bailiff, and accountable to the bishop, and has no interest.

Supply of the
Cure.

By the statute of 28 Hen. 8, c. 11, s. 5, "It shall be lawful to every archbishop, bishop, archdeacon, and ordinary, their officers and ministers, to retain in their custody so much of the profits of the vacation, as shall be sufficient to pay unto such person as shall serve the cure his reasonable stipend or salary."

Sect. 10. "And if the fruits of the vacation be not sufficient to pay the curate's stipend and wages for serving the cure the vacation time, the same shall be borne, and paid by the next incumbent, within fourteen days next after he hath the possession of his living."

And it may be safest for the churchwardens to get it stated by the ordinary, when they take out the sequestration, what they are to pay to the curate weekly for the serving of the cure; and then there can be no contention about it when they make up their accounts (*m*).

And Dr. Gibson says, such curate ought to be duly licensed by the ordinary for serving of the cure; otherwise if he proceeds without such licence, he can have no title to any stipend or salary, nor can any be legally reserved and deducted for him (*n*).

[It is enacted by 1 & 2 Vict. c. 106,

1 & 2 Vict.
c. 106.
Stipend of
Curate of
sequestered
Benefice to
be paid by
Sequestrator.

[Sect. 100. "That upon the avoidance of any benefice, by death, resignation, or otherwise, the sequestrator appointed by the bishop shall, out of the profits thereof which shall come to his hands, pay to the curate or curates appointed by such bishop to perform the ecclesiastical duties of such benefice during the vacancy thereof, such stipend or stipends as shall be ordered to be paid to him or them by such bishop, not exceeding the respective stipends allowed by this act, and in proportion only to the time of such vacancy."

Proviso for
Payment by
succeeding
Incumbent
where Profits
during Se-
questration
insufficient.

[Sect. 101. "Provided always, that if the profits of such benefice which shall have come to the hands of such sequestrator during the vacancy thereof shall not be sufficient to pay such stipend, the same, or so much thereof as shall remain unpaid, shall be paid to such curate by the succeeding incumbent of such benefice out of the profits thereof; and such bishop is hereby empowered and required, if necessary, to enforce payment of the same by monition, and by sequestration of the profits of such benefice."—ED.]

Successor
when to
enter.

The successor's right to enter commenceth immediately upon his induction, but his right to the profits commeneeth from the

(*k*) Johns. 122.

(*l*) Bunb. 192.

(*m*) Par. L. c. 29.

(*n*) Gibs. 750.

avoidance of the benefice (*o*). "But where the benefice is in lease, and there is a year or more to come in the term, the lessee may hold and enjoy the lease to the end of the year wherein he is entered at the time of the death of the last incumbent; paying to the successor all such rent and services as for the remnant of the said year shall upon such lease be due, and the successor may recover the same in like manner as his predecessor might have done. Provided, that the successor in such case may have, upon one month's warning after his induction, the mansion-house with the glebe belonging to the same (not being sown at the time of his predecessor's death), for maintenance of his household; deducting for the same in his rent as heretofore hath been paid for the same, or as it is reasonably worth (*p*)."

But this clause is repealed by the 1 & 2 Phil. & Mar. c. 17, as to leases made by parsons, vicars, or any other having any spiritual promotion (*q*).

As soon as a new incumbent is instituted and inducted, the sequestrators are to account to him for all the profits of the benefice which they have received during the vacancy (*r*).

Sequestrators
to account.

In which account they may deduct their reasonable expenses for collecting and levying the tithes, fruits, emoluments, rents, and other profits rising and growing during the vacation (*s*).

If he be dissatisfied with the account, he may bring them to account before the ordinary, by whom all things relating hereunto are properly examinable and to be determined (*t*).

In the case of *Jones v. Barret*, H., 1724 (*u*), on a bill by the vicar of West Dean, in the county of Sussex, against the defendant, who was sequestrator, for an account of the profits received during the vacation; it was objected for the defendant, that the bishop ought to have been made a party, since the sequestrator is accountable to him for what he receives, by the statute of 28 Hen. 8. And the court seemed to think the bishop should have been a party; but by consent the cause was referred to the bishop of the diocese.

II. Rights on Change of Incumbents.

By the 28 Hen. 8, c. 11, s. 6, "If an incumbent before his death hath caused any of his glebe lands to be manured and sown at his proper costs and charges with any corn or grain, he may make his testament of all the profits of the corn growing upon the said glebe lands so manured and sown." [*Vide infra*, the sort of vacation contemplated by this act.—ED.]

(*o*) [As to the right of widow of incumbent, *vide infra*, p. 6.—ED.] Serjt. Hill's MSS. [See tit. *Leases*.]

(*p*) 28 Hen. 8, c. 11, ss. 8, 9; (*r*) Wats. c. 30.

Swinb. 107. And see 9 Vin. Ab. 36. (*s*) 28 Hen. 8, c. 11, s. 5.

(*q*) *Vide* 2 Vern. Rep. 136, 204; (*t*) Wats. c. 30.

(*u*) Bunb. 192.

But if his successor is inducted before the severance thereof from the ground, the successor shall have the tithe thereof; for although the executor represent the person of the testator, yet he cannot represent him as parson, inasmuch as another is inducted (*x*).

Otherwise, if the parson dieth after severance from the ground, and before the corn is carried off, in this case, the successor shall have no tithe; because, though it was not set out, yet a right to it was vested in the deceased parson by the severance from the ground. The same is true in case of deprivation, or resignation, after glebe sown; the successor shall have the tithe if the corn was not severed at the time of his coming in, otherwise if severed (*y*).

[As to whether leases of tithes fall under the scope of 11 Geo. 2, c. 19, "An Act for the more effectual Securing the Payment of Rents and preventing Frauds by Tenants," see title *Leases*, p. 393 *a*. See also under the same title, p. 303 *c*, the act of 4 & 5 Will. 4, c. 42, respecting the payment of the apportionment of rents reserved on lands due at fixed periods, where the incumbent had died before such fixed period had arrived. But it may be as well to insert here the general doctrine of the common law as to the profits of lands sowed by tenants for years:—

["With regard to emblements or the profits of lands sowed by tenants for years, there is this difference between him and tenant for life; that where the term of tenant for years depends upon a certainty, as if he holds from Midsummer for ten years, and in the last he sows a crop of corn, and it is not ripe and cut before Midsummer, the end of this term the landlord shall have it in the absence of any special contract or custom to the contrary, for the tenant knew the expiration of his term, and therefore it was his own folly to sow what he never could reap the profits of. But where the lease for years depends upon an uncertainty, as upon the death of the lessor, being himself only tenant for life, or being a husband seised in right of his wife, or if the term of years be determinable upon a life or lives—in all these cases the estate for years, not being certainly to expire at a time foreknown, but merely by the act of God, the tenant or his executors shall have the emblements in the same manner that a tenant for life or his executors shall be entitled thereto; not so, if it determine by the act of the party himself (*z*)."]

[So in *Bulwer v. Bulwer* (*a*), it was decided that a parson who resigns his living is not entitled to emblements. But that his lessee is entitled to them, because the tenancy is determined by the act of another (*b*).

(*x*) 1 Rolle's Abr. 655.

(*y*) Gibs. 662.

(*z*) [Stephen's Comment. (citing

Blackstone), vol. i. p. 269.]

(*a*) [2 B. & A. 470.]

(*b*) [Ibid.]

[The incumbent of a living may maintain ejectment against parties in possession of the glebe lands, though the current year of tenancy from year to year created by his predecessor is unexpired (c).]

[A rector succeeded to the rectory upon the death of a former incumbent in April, 1816. A. and B. were then in possession of the glebe lands, having been tenants of the former incumbent, and they continued in possession until after December, 1816, when the rector conveyed the lands to trustees for securing an annuity; it was held, that the latter could not maintain an ejectment against A. and B. without giving them notice to quit (d).]

[In *Hatton v. Cove*, the defendant being an incumbent of a living with cure of souls valued at less than 8*l.* a-year in the king's books, accepted another benefice without having a dispensation to hold both, whereby the presentation became void *de jure* (e), but he continued in possession. The bishop presented another clerk, and afterwards brought *quare impedit* and recovered against the defendant, and afterwards the new presentee was instituted and inducted. In an action by the latter against the defendant founded on the above-mentioned statute 28 Hen. 8, c. 11, s. 3, it was held, the plaintiff could not recover the profits either from the time of his being presented or from the suing out of the *quare impedit*, the vacation contemplated by the statute being a vacation *de facto* (f).]

[The 6 & 7 Will. 4, c. 71, (Tithe Commutation Act), s. 86, enacts,— 6 & 7 Will. 4, c. 71.]

[“That the several provisions of an act passed in the fourth and fifth years of his present majesty, intituled ‘An Act to amend an Act of the eleventh year of King George the Second, respecting the Apportionment of Rents, Annuities, and other periodical Payments,’ shall extend to all rent-charges payable under this act.” 4 & 5 Will. 4, c. 22, to extend to Rent-charges under this Act.]

[The statute 1 & 2 Vict. c. 106, enacts as follows by its 36th clause,— 1 & 2 Vict. c. 106.]

[“That from and after the decease of any spiritual person holding any benefice to which a house of residence is annexed, and in which he shall have been residing at the time of his decease, it shall be lawful for the widow of such spiritual person to occupy such house for any period not exceeding two calendar months after the decease of such spiritual person, holding and enjoying therewith the curtilage and garden belonging to such house.” Widow of any Spiritual Person may continue in the House of Residence for Two Months, &c.]

[This act also contains provisions for proportioning, in cases of death or avoidance, the annual payment of sums raised under its authority for building houses of residence, between the suc-

(c) [*Doe d. Kirby v. Carter*, R. & B. & C. 126; 9 D. & R. 100.]
M. 237, Littledale.]

(e) [See title *Avoidance*.]

(d) [*Doe d. Coates v. Somerville*, 6 (f) [1 B. & Ad. 538.]

cessor and the incumbent avoiding by death or otherwise the benefice so charged; see sect. 68, under title *Leases*.

2 & 3 Vict.
c. 18.

[The 2 & 3 Vict. c. 18, s. 11, contains the following regulation with respect to residence-houses of bishops built by mortgage raised on their sees:—

A Proportion
of the half-
yearly Inter-
est, and of
the annual
Instalment of
the Principal,
to be paid on
Avoidance of
the See.

["That upon every vacancy which shall happen of any see the lands and hereditaments whereof shall have been mortgaged under the authority of this act, before such mortgage or mortgages shall be discharged, the archbishop or bishop for the time being avoiding the same, his heirs, executors, or administrators, shall pay so much of the half-yearly payment of interest upon the principal money secured by any such mortgage or mortgages accruing and not actually accrued due at the time of his ceasing to be archbishop or bishop of the said see as shall be in proportion to the time which at such avoidance shall have elapsed of the current half-year, and shall also (in case such avoidance shall happen after the expiration of the second year from the date of such mortgage or mortgages respectively), pay so much of the annual instalment which shall fall due next after such avoidance of the said see of every principal sum so to be secured as aforesaid as shall be in proportion to the time which at such avoidance shall have elapsed of the current year."

[The 3 & 4 Vict. c. 113, provides by sect. 49 that the profits of all suspended canonries shall "immediately upon and from the vacancy thereof" be vested in the ecclesiastical commissioners (f).—ED.]

Tithes not
in Lease.

With respect to those tithes which are not in lease there can be no doubt but that the executor shall be entitled to those that became due before the incumbent's death, and that the successor shall be entitled to those that became due after the incumbent's death.

And here a case frequently happeneth with respect to moduses in lieu of tithes; which tithes, if taken in kind, would have been due before the death of the incumbent, and the modus for the same is not due till after the death of the incumbent. Which case not coming in any sense within the purview of the said statute, it seemeth that the executors are not entitled to the said modus or to any part thereof, but that the whole shall go to the successor.

There is another case wherein it may be disputed at what time the modus itself shall be said to be due. As, for instance, it is usual in many places to ascertain the modus at Martinmas, by then taking an account of the stock for the year preceding, and not to receive the modus till Easter following. In which case, if it shall appear from the evidence, as from payment thereof, sometimes made at the time when ascertained, or in the intermediate space betwixt that time and the more usual and ordinary days of payment, or from receipts given and ac-

(f) [See title *Deans and Chapters*, vol. ii. p. 125 m.]

cepted for the same as due at the time when ascertained, or the like, and that the payment thereof was only deferred for convenience, when the incumbent should receive his other dues, or for other like cause, in such case it will be due to the executor. But if it shall appear that the same hath been understood as not due until such future day, and only advanced sometimes before such day to answer the incumbent's necessities or other convenience, then it seemeth that it will go to the successor. So that this is a matter not of law, but of fact, and depends upon the evidence.

As to disputes concerning things fixed to the freehold, as hangings, tapestry, grates, glasses, furnaces, and such like, these, falling in with the general doctrine about what shall belong to heirs or successors on the one hand, and executors or administrators on the other, are treated of under the title *Wills*. [A mandamus lies to deliver up the keys of the church (*g*).—Ed.]

Vacation of Bishoprics—See **Bishops**.

Vestry—See **Churchwardens** [and **Vestry**.]

Vicar [and **Vicarage**(*h*).]

A VICAR, *vicarius*, is one that hath a spiritual promotion or living under the parson, and is so denominated as officiating *vice ejus*, in his place or stead: and such a promotion or living is called a *vicarage*, which is a part or portion of the parsonage allotted to the vicar for his maintenance and support.

This part or portion is in some places an annual sum of money certain; but in most places it is a part of the tithes in kind, which most commonly is the small tithes; and in some places he hath a part of the great tithes and also of the glebe; and such a one is called a vicar endowed.

Thus he that hath the right to the possession of the lesser part is called a vicar; and he that hath the other and greater part of tithes, is called the parson, who in some parishes is a clergyman, and sometimes the minister or incumbent of the

(*g*) [*Anon.*, 2 Chitt. 255.]

(*h*) [*Gibson's Cod.* 753; *Ayliffe's Parerg.* 511; *Kennet's Case of Im-*

propriation, 43; *Year Book*, 40 Ed. 3, pl. 27.]

same church; but in other places he is a mere layman, and cannot supply the church but by a spiritual vicar; and this so possessed by a layman, is called an *impropriation*, and himself the *impropriator*.

An *appropriation* is properly when such a parsonage (or vicarage or other church preferment) is in the hands or possession of some ecclesiastical person and his successors, and can be made only to a body politic or corporation spiritual that hath succession, whereby such body becomes perpetual incumbent of the benefice appropriated, and shall for ever enjoy the tithes and other profits, and the cure of souls belonging thereto.

But the words *impropriation* and *appropriation* are generally confounded in the books; and the law concerning the whole is treated of under the title **Appropriation**, *ante*, vol. i.

[The 1 & 3 Vict. c. 106, enacts by section 25,

Vicar or Perpetual Curate may reside in Rectory House.

“That in all cases of rectories having vicarages endowed or perpetual curacies the residence of the vicar or perpetual curate in the rectory house of such benefice shall be deemed a legal residence to all intents and purposes whatever: provided that the house belonging to the vicarage or perpetual curacy be kept in proper repair to the satisfaction of the bishop of the diocese.”

[And by section 61,

Vicar's Oath, &c. abolished.

“That no oath shall be required of or taken by any vicar in relation to residence on his vicarage; any law, custom, constitution or usage to the contrary notwithstanding.”

[For the 29 Car. 1, c. 8, 1 & 2 Will. 4, c. 45, and the 26th section of 4 & 5 Vict. c. 39, relating to augmentations made by ecclesiastical persons to small vicarages, &c. see *ante*, vol. i. title **Benefice**.—ED.]

Vicar General.

VICAR GENERAL is an officer whose office is usually annexed to that of chancellor, and is therefore treated of under that title.

Vigil—See **Holidays**.

Vi Laica Removenda.

VI LAICA REMOVENDA is a writ which (upon the bishop's certificate in chancery of a force and resistance touching a church) lieth where a debate or controversy is between two parsons for a church, the one whereof doth enter into the church with strong hand and great power of the laity, holding the other out, and keeping possession thereof with force and arms. Whereupon he that is so held out of possession may have the said writ directed to the sheriff of the county, to remove the force within that church, and (if need be) to raise the power of the county to his assistance, and to arrest and imprison the persons that make resistance, so as to have their bodies before the king at a certain day to answer the contempt. Which writ is sometimes grantable without the bishop's certificate as aforesaid: for it may, as it seemeth, be had upon a surmise made thereof by the incumbent himself without such certificate; there being a distinct and several form thereof in each of the said cases. So that this writ properly lieth for the removal of any forcible possession of a church kept by laymen (*i*).

By this writ the sheriff ought not to remove the incumbent who is in possession of the church, whether the possession be of right or wrong, but only to remove the force (*k*).

The writ is made returnable into the King's Bench, in which court the offenders shall be fined and punished for the force; and restitution also shall be awarded out of the same court (as it seemeth (*l*)).

Visitation (*m*).

1. <i>General Visitation by Archbishop and Bishop</i> 11 2. <i>Bishop's Triennial Visitation</i> 22		3. <i>Archidiaconal Visitations</i> 24 4. <i>Royal Visitations</i> 38
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I. General Visitation by Archbishop and Bishop.

NOTE, free chapels and donatives (unless such donative hath received the augmentation of Queen Anne's bounty) are ex-

(<i>i</i>) God. 645; F. N. B. 124. (<i>k</i>) F. N. B. 125. (<i>l</i>) Wats. c. 30. (<i>m</i>) [Cf. Bishop Stillingfleet's Duties and Rights of Parochial Clergy, vol. iii. p. 520—638; Bishop Gibson on Visitations; Barbosa de Officio et Potestate Episcopi; De Visitatione	cujuscumque Prælati Ecclesiastici, a Gaudentio de Janua; De Episcopis eorum Auctoritate, Officio et Potestate, Joannis Bertachini a Firmo; The King's Visitatorial Power asserted, by Nathaniel Johnston, London, 1648; <i>Attorney-General v. Smithies</i>, 1 Keen, 289.—Ed.]
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empt from the visitation of the ordinary ; the first being visitable only by commission from the king, and the second by commission from the donor. And there are also other churches and chapels exempted, which did belong to the monasteries, having heretofore obtained exemptions from ordinary visitation, and being visitable only by the pope, which by the statute of 25 Hen. 8, c. 21, were made visitable by the king or by commission under the great seal. These, and other exempted churches or chapels, so far forth as they are exempted are not treated of under this title, the purport whereof extendeth only to places visitable by the bishop or his subordinate officers.

Origin.

For the government of the church and the correction of offences, visitations of parishes and dioceses were instituted in the ancient church, that so all possible care might be taken to have good order kept in all places (*n*).

Who shall visit.

For the first six hundred years after Christ, the bishops in their own persons visited all the parishes within their respective dioceses every year, and they had several deacons in every diocese to assist them. After that they had authority in case of sickness or other public concerns, to delegate priests or deacons to assist them ; and hereupon, as should seem, they cantoned their great dioceses into archdeaconries, and gave the archdeacons commissions to visit and inquire, and to give them an account of all at the end of their visitations ; and the bishops reserved the third year to themselves, to inform themselves (amongst other things) how the archdeacons, their substitutes, performed their duties (*o*).

How often and in what order.

By a constitution of Otho, archbishops and bishops shall go about their dioceses at fit seasons, correcting and reforming the churches, and consecrating and sowing the word of life in the Lord's field (*p*).

And, regularly, the order to be observed therein is this : In a diocesan visitation, the bishop is first to visit his cathedral church ; afterwards the diocese. In a metropolitical visitation, the archbishop is first to visit his own church and diocese ; then in every diocese to begin with the cathedral church and proceed thence as he pleaseth to the other parts of the diocese. Which appears from abundance of instances in the ecclesiastical records, as well of papal dispensations for the archbishop to visit without observing the said order, as of episcopal licences for the visitor to begin in other parts of the diocese than in the cathedral church (*q*).

And this sprang from the precept of the canon law, which requires that the archbishop willing to visit his province shall first visit the chapter of his own church and city, and his own diocese ; and after he hath once visited all the dioceses of his province, it shall be lawful for him (having first required the

(*n*) God. Append. 7.

(*p*) Ath. 56.

(*o*) Deg. p. 2, c. 15 ; Johns. 151.

(*q*) Gibs. 957.

advice of his suffragans, and the same being settled before them, which shall be put in writing that all may know thereof) to visit again, according to the order aforesaid, although his suffragans shall not assent thereunto. And the like form of visiting observed by the archbishops shall be observed also by the bishops in their ordinary visitations (r).

[The general power of the ordinary and metropolitan, in their capacity of a visitor, is much discussed under the title of **Deans and Chapters**, as is that of the visitor appointed by the founder of a college under the titles **Colleges** and of **Schools**. It may be as well to mention in this place, that where the Ordinary or Metropolitan have a right to visit, the manner of the visitation is not so material as to be a ground for prohibition, because any error or defect in the manner of the visitation may be remedied by appeal (s). It has been decided also, that even where a benefice is appropriated to a prior or a dean and chapter, the bishop may visit, to see how the church is served, &c., and for contumacy may proceed to suspension (t).

General
Power of
a Visitor.

[In *Rex v. Bishop of Chester*, a mandamus was denied to a visitor who had deprived a prebendary for incontinency, and to restore a canon whom he had expelled (u), or to reverse his own sentence (x); but in this case the bishop was by royal charter visitor of the cathedral. But a prohibition has been issued to a bishop, who claimed a right to present by lapse, under pretence of his visitatorial authority, to the office of a canon residentiary of his church, it being a freehold office, and the right of election thereto; nor does it seem certain that by virtue of this power he may, in a case where the dean and chapter have neglected or refused to appoint such a canon, appoint one *pro tempore* until such election be had.

Case of *Rex*
v. Bishop of
Chester.

[In 1840 the Archbishop of York held a visitation of the dean and chapter of that cathedral church, and appointed a Commissary (y) for the purpose of carrying it into effect. The account of the early part of this visitation is given under the title **Deans and Chapters**, in the second volume of this work, and the subject is also mentioned under the titles **Privileges and Restraints of the Clergy**, and **Simony**, in the third volume.

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York's Case.

[Among the presentments made to the Commissary was one which charged the Dean with the sale of the livings in his ecclesiastical patronage. The Dean denied the jurisdiction of the commissary to try the charge, and conducting himself with violence in court, was pronounced in contempt, for which he

(r) Gibs. 957.

Dublin (in Error), 2 Bro. P. C. 199.]

(s) [*Kildare* (Bishop) *v. Dublin*
Archbishop (in Error), 2 Bro. P. C.
179.]

(u) [*Rex v. Chester* (Bishop), 1
Wils. 206, and 1 W. Bla. 22.]

(x) [*Ibid.*]

(t) [*Harrison v. Archbishop of*

(y) [*Dr. Phillimore.*]

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refused to purge himself during the trial. The commissary proceeded to try the charge in the visitatorial court, witnesses were examined *vivâ voce*, and their depositions taken down by the registrar. Finally, the commissary, in a very long and elaborate judgment, pronounced the dean guilty of simony, and to have incurred the penalty of deprivation on the two-fold ground of contumacious behaviour and simoniacal practices. The dean applied for a prohibition, after sentence, to the Court of Queen's Bench (z).

Arguments of
Counsel.

[For the prohibition it was argued, that the commissary had exceeded the limits of the visitatorial jurisdiction, even as it stood before the 3 & 4 Vict. c. 86, as the proceedings ought to have been by articles, like all criminal suits in the ecclesiastical courts; but since the statute of 3 & 4 Vict. the whole trial was clearly illegal,—that the chapter of York were exempted from the visitatorial power of the ordinary,—that the proceedings were bad in the absence of the party accused,—that evidence was taken *vivâ voce*. On the other hand it was argued against the prohibition, that *jure ordinario*, every bishop or metropolitan might visit his cathedral,—that if he might visit he might punish, and therefore deprive if the offence was of a magnitude to require such punishment,—that the 3 & 4 Vict. c. 86, was framed *alio intuitu*,—that the visitatorial rights required express words to take them away,—that they were saved by sect. 25 of that act,—that such power had been exercised in *Goodman's case* (a),—that there was a court of appeal (the judicial committee of the privy council) which would correct the judgment, if wrong,—that it was competent to a visitor to proceed *summarie*, as in the case of a college, the power of the visitor being the same in both cases,—that it was too late to apply for a prohibition after sentence. It will be seen, however, that the prohibition was granted; but it is important to observe, that every other proceeding in the visitation, up to the time of trying the charge, was recognized as valid and legal by the Court of Queen's Bench.

[The great importance of the judgment seems to require its insertion at length in this chapter.

Judgment.

[By Lord Denman (b).—"The proceedings in this case may be very shortly stated. His grace the archbishop solemnly cited the dean and chapter of York to attend his visitation, and

(z) [The cause was argued by Mr. Cresswell, Q. C., Sir W. Follett, Q. C., Addams, Advocate in Doctors' Commons, and Mr. Cockburn, for the dean; by Sir John (now Lord) Campbell, Attorney-General, Sir James Wylde, Solicitor-General, Mr. Dundas, Q. C., R. Phillimore, Advocate in Doctors Commons, and Mr. Bayley, for the Archbishop of York and the Commissary.—Ed.]

(a) [Dyer, 273. Where the Bishop of Bath and Wells deprived the Dean of Bath and Wells by his commissary. It is remarkable that this case, though much relied upon by the counsel against the prohibition, was not mentioned in the judgment.—Ed.]

(b) [Copy from Mr. Gurney's short hand notes of the judgment delivered in the Court of Queen's Bench, Saturday, 19th June, 1841.]

appointed the learned civilian, Dr. Phillimore, his commissary, for correcting and punishing, by ecclesiastical censures, whomsoever shall be contumacious, and for administering articles in writing to the said dean and chapter, and receiving presentments and answers, and for doing every thing else appertaining to the nature and quality of our said visitation.

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[“The ancient formula observed upon such occasions is in these terms: ‘Cum nos ad errata enormia et delicta corrigendum et extirpandum et virtutes et alia ad pietatem conducendum plantandum et ad Dei laudem instituendum et seminandum,’ &c.

[“There seems no reason to doubt that here was sufficient authority to inquire into the ecclesiastical offences of every spiritual person belonging to the body visited; but at first the proceeding was confined to the fiscal concerns of the chapter, relating principally to the application of the fabric fund. The dean attended, and being examined respecting some share of this money which he was said to have received, conducted himself during that proceeding in a manner which was deemed contumacious, and a sentence of contumacy was by the commissary pronounced against him; he then absented himself. The proceedings went forward, and in answer to an interrogatory, as to the state of repair in which several churches and chapels were, the Rev. Mr. Dixon, one of the canons, made a statement that was considered as a direct charge of simony against the dean. He was requested to attend in order to meet this charge, and he did attend: the commissary required him, in the first place, to purge himself of the contempt, which he declined to do, and again absented himself, protesting against the proceeding, and saying, not by way of consent, but of defiance, that Mr. Dixon might go on to prove his charge in his absence; he did so, and the learned commissary declared the proof satisfactory, pronounced the charge established in several cases, and gave judgment that the dean should be for that offence, as well as for his contumacy, deprived of his office. Sentence to the like effect was afterwards solemnly pronounced by the archbishop.

[“Prohibition is claimed on various grounds: and that which requires to be first considered, is the late act of parliament of the 3 & 4 Vict. c. 86, for better enforcing church discipline, which recites that the manner of proceeding in causes for the correction of clerks, requires amendment, repeals the act of the 1 Hen. 7, c. 4, prescribes the course of proceeding that shall hereafter be observed, in every case of any clerk in holy orders, who may be charged with any offence against the laws ecclesiastical, and finally enacts that no criminal suit or proceeding against a clerk in holy orders for any offence against the laws ecclesiastical, shall be instituted in any ecclesiastical court, otherwise than according to the provisions of that act.

[“These enactments are, however, qualified by a proviso,

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'That nothing in this act contained shall be construed to affect any authority over the clergy of their respective provinces or dioceses which the archbishops or bishops may now, according to law, exercise personally and without process in court.' And the 23d section, enacting that no criminal suit or proceeding shall be instituted in any other manner than as this act requires, was relied upon as a decisive bar against the trial which has taken place.

["The counsel for the dean argued, that he being a clerk in holy orders was prosecuted in a criminal proceeding for the offence of simony, a known offence against the laws ecclesiastical, and that the authority which assumed to deprive him is an ecclesiastical court, that is, the court of the ordinary holding his visitation. In answer to that, arguments are offered first, that what has been done is not a criminal proceeding within the meaning of the act. Secondly, that the proceedings were by virtue of the authority exercised by the archbishop according to the law as it then stood over a clerk in his province personally, and without process, and so were exempted from the operation of the act, sect. 23. The learned counsel against the prohibition, observed in the first place, that the statute applied to, causes a word said to be well understood, and to imply suits regularly promoted in the ecclesiastical court; but the employment of that word in the short preamble affords a most inadequate reason for the arbitrary restriction of the whole act, to that form of proceeding which in the ecclesiastical law may be properly described as a cause. It might as well be said to be restricted to causes promoted for incontinence, that being the only clause under the 1st of Henry VII. which is repealed in the same section after the recital that the manner of proceeding for the collection of costs ought to be amended. But though the first section is thus limited, the general enactments are extended to all offences, and in like manner, though causes are the only proceedings mentioned in the preamble; the 23d section clearly provides that the course imposed by the statute shall be pursued in every criminal suit or proceeding against a clerk in holy orders in the courts ecclesiastical.

["But is this properly styled a criminal proceeding, or is it merely an incidental fact arising out of the visitation, in the course of which it is brought to the ordinary's knowledge, and properly in the discharge of that duty inquired into by him, but not instituted as a criminal proceeding? The answer appears to be, that as soon as the visitor proceeds to examine the proof of the ecclesiastical offence charged upon the clerk for purpose of punishment by deprivation, or otherwise, more especially as in this case, at the instance of an accuser who avails himself of the aid of a professional advocate, a criminal proceeding is undoubtedly instituted and in progress.

[“There is yet another term in the description of suits or proceedings given in the 23d section—they must be in some ecclesiastical court. The ordinary’s visitation is said not to be an ecclesiastical court, but to range within the proviso of sect. 25, which prevents the statute from applying to authority personally exercised by a bishop without process in court. This brings us directly to the question, whether a bishop as visitor of a dean and chapter is legally invested with power to deprive the dean of his office for an ecclesiastical offence without process in court. If he has the power he must derive it from the general words above cited, but they can scarcely be expected to receive this construction without proof that they have habitually, and in former times when church discipline was much more active than of late, been so construed, or at least that the learned writers on ecclesiastical law have put that construction upon them.]

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[“Now in the first place there is no example of such a power being exercised by the bishops over their clergy even in their regular and solemn visitations. They are indeed exempted from the forms required by the common law; they are to proceed, according to the language found in many of the books, and collected in Comyn’s Digest, Visitor C, ‘*summariè, simpliciter, et de plano, sine strepitu aut figura judicii.*’ That is, adds Comyn, ‘according to mere law and right;’ some forms as involving an opportunity of knowing and answering the charges were absolutely necessary for securing this object.]

[“The Report of the Ecclesiastical Commissioners was appealed to on both sides. On the one for proof that the late statute was not meant to apply to the visiting power, because no recommendation to that effect was given. We have frequently had occasion to observe that the courts have no right to look to similar reports for the purpose of construing statutes founded upon them, which must speak for themselves. On the other hand, the report was referred to as an expositor of the former law, which was said not to have trusted the visitor with the power now claimed. It states, that the ordinary was to proceed in the visitation of clerks in his *forum domesticum*. However those words are to be understood, spiritual persons who offended were to be presented by the churchwardens, on whom this duty was cast, and if they neglected it, others might present, or even if common fame were the only accuser the ordinary might make his inquiries; different modes of dealing with the charges are enumerated, inquiries were instituted and denominations and articles were exhibited, and the party had time and place given him to answer. Sentence was at length passed by the ordinary, personally perhaps, but according to all our experience in his court, and in the usual sense of the words without process; and on this head of the argument, a question was asked, and which was not satisfactorily answered,

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why if the ordinary possessed this authority personally, and without process, such great difficulties have been encountered and such enormous expenses have been incurred in bringing notorious spiritual delinquents to justice by deprivation? It is well known that the assumed want of power in the court formed one of the strong motives for introducing the new law. The saving clause may not improbably have been intended to apply to some such powers vested by law in the archbishops and bishops, but even if none such can be surmised, the effect of any such saving clause cannot be greater than to continue the power the same as it has existed; it cannot create an authority in any one to act personally and without process in any particular case, by simply saying, that the act does not deprive him of such authority in general terms. The question remains, what does the law recognize?

[“ We are aware that the jurisdiction of visitors has been described in most comprehensive terms by common lawyers of high authority. Lord Holt himself is cited as allowing them an arbitrary power in his often reported judgment in the case of *Phillips v. Bury*, which taken from his own manuscript, and now printed in 2nd Term Reports, agrees almost word for word with that which is recorded by Skinner—scarcely any other remark upon that requires to be made than that the case arose out of the visitation of a charitable foundation. Lord Holt’s strong language is all applied to that case, that a founder might do as he would with his own, and that the party deriving benefit from his endowment must do so on the conditions he has annexed to it—*cujus est dare ejus est disponere*.

[“ The case of *The Bishop of St. David’s v. Lucy*, in 1st Lord Raymond and 1st Salkeld, was cited, where the Archbishop of Canterbury gave sentence of deprivation against one of his suffragan bishops for simony and other ecclesiastical offences, and this was supposed to show that that power resided in the breast of the archbishop without any rules or forms being observed whatever. Prohibition in that case was refused, but it had been claimed, because the citation was to appear at Lambeth, not in the usual place of holding the metropolitan court; and it was answered by Lord Holt and his brethren, that an archbishop may hold his court where he pleases, and that the spiritual court may proceed to punish a bishop for any offence done against the duty of his office as bishop. And as the clergy are subject to different rules and duties, it is but reasonable that if such person offends in his ecclesiastical duty, he should be punishable for it in the ecclesiastical court. These expressions all occur in Salkeld. The bishop was compelled by citation to answer for his delinquency; the form and mode of proceeding were objected to in no other particular than the place. We scarcely need say

that this case supplies no evidence of the right to proceed personally and without process in court. *The Dean of York's Case.*

[“ Another case was cited for the same purpose. *The Bishop of Kildare v. The Archbishop of Dublin*, brought by writ of error into the House of Lords in 1724. The bishop, as dean of the cathedral church of the Holy Trinity, Dublin, complained that the archbishop had proceeded against him for contempt committed during a visitation. The principal question there intended to be raised, was whether the king or the archbishop was the visitor of the dean and chapter of that cathedral? and this being decided in favour of the archbishop, all other questions respecting the mode of proceeding were comparatively unimportant; nor, indeed, does the case furnish us with any full detail of what took place. Enough however appears to show that the offence was contumacy committed on shutting the doors of the cathedral against the archbishop, and not appearing in his visitation, and that the archbishop impleaded the dean in the Court Christian in his visitation as ordinary under pretence of a contempt. The House of Lords held that the right of the archbishop to visit the dean and chapter was established, and that the manner of his doing so was not at all material, because any error or defect in the manner might be remedied by appeal, and was no ground for a prohibition: and this is the marginal note appended to the report, that where an archbishop has a right to visit, the manner of his visitation is not so material as to afford a ground for a prohibition. But the declaration there, instead of alleging that the visitor proceeded to sentence (whatever that sentence might be, for it is not set forth in Brown's Reports) personally and without process, leads to the contrary inference. The words are a description of a suit instituted by the archbishop in his court as ordinary, and even where the offence was a charge of contempt against his person and authority. But it is enough to say, that it is indisputably true, that this case does not establish that proposition for which alone it was wanted, that the visitor has a lawful power to deprive personally and without process in court.

[“ So in *The Bishop of Exeter's case*, reported in Wilson and Blackstone, the acts of the bishop having been performed in his jurisdiction as visitor of Exeter College by appointment of the royal founder, were held by this court as conclusive. Such decisions can have no bearing upon the present case, unless it were shown that all the powers that any founder has conferred on his visitor grow out of the relation of ordinary to his clergy on his holding a visitation of them (c). It is highly probable that the use of the same words on two such different occasions has led to the belief that such was the law. The

(c) [A declaration in prohibition not being granted, there could be no appeal from this decision.—ED.]

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opinion is thus accounted for, but the law can only be established by practice and precedents, and both are wanting here.

[“ Some of the books speak of the court of visitation, and the phrase appears to be a correct one. It is an authority acting with general forms of procedure and inquiry, held from time to time by adjournment, making certain orders and decrees, whether or not those acts are of necessity judicial; those done in the course of establishing a charge against a party accused bear that undoubted character. This authority declared a party in contempt for withdrawing himself after citation. It then presided over the examination of witnesses in support of charges preferred against him, and finally adjudged him guilty, and awarded sentence of deprivation. All these are assuredly the acts of a court, and we cannot conceive that the rights of appeal against what was done, which was assumed and admitted on all hands, can be had against acts not done by a court. That court however the late statute has divested of all such jurisdiction; it is not within the saving clause, which leaves untouched the ordinary's power over his clergy, as it might then be exercised by law without process in court, because this power does not appear ever to have been exercised by law.

[“ We are constrained to conclude, that the most reverend prelate, in so far as he proceeded in his visitation to deprive the dean, has acted beyond his jurisdiction. We therefore decline to enter upon the consideration of the numerous points of objection raised against other portions of the proceeding of the learned commissary. But there is one which is not unfit to be disposed of; it was argued that the sentence was final, and that there was nothing now remaining which this court could prohibit from being done, and that there was not even a continuing court to which our writ could be addressed. These arguments, for obvious reasons, require to be narrowly watched, for they would give effect to unlawful proceedings merely because they were brought to a conclusion. But to the present case they are inapplicable, for on looking to the sentence we find that it admonishes the party not to exercise the functions of dean on pain of the greater excommunication, (and we find, too, that the court was adjourned only when this motion was made,) the inflicting of which pain would be the mode of enforcing the sentence, and this we may prohibit. We may also require a revocation of that sentence, according to the several forms, and it is plain that the dean could not apply before sentence, for the sentence of deprivation is the only thing done which is beyond the jurisdiction of the archbishop. *Up to that point his grace unquestionably had power to inquire with a view to ulterior proceedings, and it seems that the lord chancellor discharged an application for a prohibition that had been made to him before sentence upon that very ground.*

[“ Our clear conviction is not embarrassed by the opposite judgment formed by the learned commissary, for he does not appear to have adverted to the statute; during the whole proceedings in the court below it appears to have escaped his attention, occupied as it must have been with a vast variety of unusual circumstances, and not assisted, as indeed it could not be, according to the view which he took of the duties of his office, by advocates on both sides. If we felt any doubt, we should be bound to invite further discussion by calling on the dean of York to declare in prohibition (c), but no additional light can be expected after the full and elaborate, and well prepared, and maturely digested arguments, which we have heard enforced with consummate ability by counsel of the greatest learning and the highest eminence, and we owe it to all the parties to save them all the anxiety and inconvenience which would result from delay, and on the other hand, we owe it to the church to encourage no doubt, where we feel none, on subjects of such great importance, and so deeply affecting its interests, its rights, and its duties. The rule therefore for the prohibition must be made absolute.—Rule absolute.”

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[At a subsequent stage of the visitation the dean appeared and read a paper expressive of regret for his contumacy, and for the sale of his livings, whether illegal or not, whereupon the commissary absolved him from his contumacy.

[The 3 & 4 Vict. c. 113, commonly called the Dean and Chapter Act, provides as follows :

[Sect. 47. “ That the chapters of the several cathedral and collegiate churches shall from time to time, of their own accord, or upon being required by the visitors of the said churches respectively, propose to such visitors such alterations in the existing statutes and rules as shall provide for the disposal of the benefices in their patronage, so as to meet the just claims of the minor canons of such churches, and as shall make them consistent with the constitution and duties of the chapters respectively as altered under the authority of this act; and all such alterations, if approved, may be confirmed by the authority of such visitor; and that in any case in which such alterations shall not be approved, or in which such requisition shall not be complied with within twelve calendar months after the making thereof, the visitor shall be at liberty of himself to make the necessary alterations; and all such statutes and rules when so altered shall be submitted to the ecclesiastical commissioners for England, and may be confirmed by the authority hereinafter provided; and that as to any alteration made by a visitor alone, the said commissioners shall communicate a draft thereof to the chapter to be affected thereby, and shall, together with any scheme to be prepared by them under the authority hereinafter contained, lay before her Majesty in council such remarks as may within three months have been made thereon by such chapter; and that out of the proceeds of the suspended canonries in any chapter provision may from time to time be made, by the authority herein-

*Chapters, or
Visitors in
their Default,
to propose
Alterations in
their Statutes.*

(c) [See the last note.]

after provided, for relieving the present canons of such chapter from the performance of any additional duty by reason of such suspension, by the employment of substitutes, to be approved by the respective bishops: Provided always, that nothing herein contained shall be construed to affect any existing right of chapters with their visitors to make statutes."

[And again, by its 68th section, that "any sum of money which shall have been invested in the public funds or in other security or securities in trust for any ecclesiastical body corporate, aggregate or sole, may, upon an application in writing to the ecclesiastical commissioners for England under the hand and seal of such body corporate, and in the case of any chapter, with the consent of the visitor thereof, be directed to be sold, and the same shall be sold accordingly," &c. (*d*)

Disposal of
Residence
Houses
belonging to
Cathedrals
with Consent
of Visitor.

[The 4 & 5 Vict. c. 39, enacts, by sect. 18, that the provisions of the 3 & 4 Vict. c. 113, s. 58, "relating to the disposal of residence houses, and houses attached to any dignity, prebend, or office in the precincts of the respective cathedral and collegiate churches, and also so much of an act passed in the second year of the reign of his late majesty as annexes to the archdeaconry of Durham the house of residence therein mentioned, shall be repealed; and that the dean and chapter of any cathedral or collegiate church, with the consent of their visitor, may from time to time sanction and confirm the exchange of houses of residence, or of houses attached to any dignities, offices, or prebends in the precincts of such church, among the canons of such church, or may make any such arrangement to take effect at any future time, or may assign any one of such houses being vacant to any canon willing to accept the same in lieu of the house theretofore occupied by him, and thereupon any house no longer required by any canon may by the said dean and chapter be disposed of, in such way as they shall deem fit, with the consent of their visitor, and of the ecclesiastical commissioners for England, signified under their common seal; provided that all acts, matters, and things relating to any such house already done under the last-mentioned provisions of the said secondly recited act shall be valid and effectual to all intents and purposes."—ED.]

II. *Triennial Visitation by Bishop.*

By can. 60, for the office of confirmation, it is enjoined, that the bishop shall perform that office in his visitation every third year; and if in that year, by reason of some infirmity, he be not able personally to visit, then he shall not omit the same the next year after, as he may conveniently.

Upon which Dr. Gibson observeth, that by the ancient canon law, visitations were to be once a year: but it is to be noted, that those canons were intended of parochial visitations, or a personal repairing to every church; as appears not only

(*d*) [See title *Deans and Chapters.*]

from the assignment of procurations (originally in provisions and afterwards in money) for the reception of the bishop; but also by the indulgence which the law grants in special cases, where every church cannot be conveniently repaired to, of calling together the clergy and laity from several parts unto one convenient place that the visitation of them may not be postponed. From this indulgence, and the great extent of the dioceses, grew the custom of citing clergy and people to attend visitations at particular places; the times of which visitations, as they are now usually fixed about Easter and Michaelmas, have evidently sprung from the two yearly synods of the clergy, which the canons of the church required to be held by every bishop about those two seasons, to consider of the state of the church and religion within the respective dioceses: an end, that is also answered by the presentments that are there made concerning the manners of the people; as they used to be made to the bishop at his visitation of every particular church. But as to parochial visitation, or the inspection into the fabrics, mansions, utensils and ornaments of the church, that care hath been long devolved upon the archdeacons; who at their first institution in the ancient church were only to attend the bishops at their ordinations, and other public services in the cathedral; but being afterwards occasionally employed by them in the exercise of jurisdiction, not only the work of parochial visitation, but also the holding of general synods or visitations when the bishop did not visit, came by degrees to be known and established branches of the archidiaconal office as such; which by this means attained to the dignity of ordinary, instead of delegated jurisdiction. And by these degrees came on the present law and practice of triennial visitations by bishops; so as the bishop is not only not obliged by law to visit annually, but (what is more) is restrained from it (e).

[The *Reformatio Legum* contains the following provision on this subject: “*Diocesim totam tertio quoque anno visitat, et procuraciones accipiat—at vero aliis temporibus quoties visum fuerit visitat propter novos casus qui incidere possint ei liberum esto modo suis impensis id faciat, et nova onera stipendiorum aut procurationum ab ecclesiis non exigat* (f).—ED.]

Lindwood says, the archdeacon, although there be not a cause, may visit once a year: but if there be cause, he may visit oftener. Nor doth it hinder, where it is said in the canon law, that he ought to visit from three years to three years; for this is to be understood so that he shall visit from three years to three years of necessity, but he may visit every year if he will (g).

In the bishop's triennial, as also in visitations regal and metropolitical, all inferior jurisdictions respectively are inhi-

Inhibition during the Time of Visitation.

(e) Gibs. 958.

(f) [Ref. Leg. 50 a.]

(g) Lind. 49.

bited from exercising jurisdiction, during such visitation. And we find, in the time of Archbishop Winchelsey, a bishop prosecuted for exercising jurisdiction before the relaxation of the inhibition; and in Archbishop Tillotson's time, a bishop suspended, for acting after the inhibition. And even matters begun in the court of the inferior ordinary (whether contentious or voluntary) before the visitation of the superior, are to be carried on by the authority of such superior (*h*).

However, it hath not been unusual, especially in metropolitical visitations, to indulge the bishops and inferior courts, in whole or in part, in the exercise of jurisdiction, pending the visitation. Thus, we find relaxations granted, pending the visitation, by Archbishop Abbot; and by others, an unlimited leave or commission, to exercise jurisdiction, or proceed in cases, notwithstanding the visitation; and elsewhere, a leave to confer orders, confirm, grant flats for institution, institute, or correct, whilst the inhibition continued in other respects (*i*).

After the relaxation of the inhibition, and especially in metropolitical visitations, we find not only reservations of power to rectify and punish the *comperta et detecta*, but also special commissions issued for that end (*k*).

Where.

Can. 125. "All chancellors, commissaries, archdeacons, officials, and all others exercising ecclesiastical jurisdiction, shall appoint such meet places for the keeping of their courts, by the assignment or approbation of the bishop of the diocese, as shall be convenient for entertainment of those that are to make their appearance there and most indifferent for their travel. And likewise they shall keep and end their courts in such convenient time, as every man may return homewards in as due season as may be."

III. Archidiaconal Visitations.

[The 4 & 5 Vict. c. 39. s. 28, reciting the former Cathedral Suspension Acts (5 & 6 Will. 4, c. 30; 6 & 7 Will. 4, c. 67; 2 & 3 Vict. c. 55) enacts, "that any bishop or archdeacon may hold visitations of the clergy within the limits of his diocese or archdeaconry, and at such visitations may admit churchwardens, receive presentments, and do all other acts, matters, and things by custom appertaining to the visitations of bishops and archdeacons in the places assigned to their respective jurisdiction and authority under or by virtue of the provisions of the said first or secondly recited act; and any bishop may consecrate any new church or chapel or any new burial ground within his diocese."—ED.]

General
Power of the
Visitor.

Langton. "The archdeacons in their visitation shall see

(*h*) Gibs. 958.

(*i*) Ibid.

(*k*) Ibid.

that the offices of the church be duly administered; and shall take an account in writing of all the ornaments and utensils of the churches, and also of the vestments and books; which they shall cause to be presented before them every year for their inspection, that they may see what have been added, or what have been lost (*l*)."

Account in Writing.]—And it would be well to have same indented: one part to remain with the archdeacon, and the other with the parishioners (*m*).

Utensils.]—That is, which are fit or necessary for *use*: and by these are understood all the vessels of the church of every kind (*n*).

Every Year.]—That is, every year in which they shall visit (*o*).

That they may see.]—Therefore the archdeacon ought to go to the place in person to visit, and not to send any other; which if he do, he shall not have the procurations (due upon the account of visiting) in money: but otherwise, he whom he shall send shall receive procurations for himself and his attendants in victuals (*p*).

Otho. "Concerning archdeacons we do ordain, that they visit the churches profitably and faithfully; by inquiring of the sacred vessels, and vestments, and how the service is performed, and generally of temporals and spirituals: and what they shall find to want correction, that they correct diligently. And when they visit, correct or punish crimes, they shall not presume to take anything of any one (save only moderate procurations), nor to give sentence against any persons unjustly, whereby to extort money from them. For whereas these and such like things do savour of simony, we decree, that they who do such things shall be compelled by the bishop to lay out twice as much for pious uses; saving nevertheless other canonical punishment against them. And they shall endeavour frequently to be present at the chapters in every deanry, and therein instruct the clergy (amongst other things) to live well, and to have a sound knowledge and understanding in performing the divine offices (*q*)."

Chapters.]—That is, rural chapters (*r*).

Reynolds. "We enjoin the archdeacons and their officials, that in the visitation of churches they have a diligent regard to the fabric of the church, and especially of the chancel, to see if they want repair: and if they find any defects of that kind, they shall limit a certain time under a penalty within which they shall be repaired. Also, they shall inquire by themselves or their officials, in the parishes where they visit, if there be

(*l*) Lind. 50.

(*m*) Ibid.

(*n*) Ibid.

(*o*) Ibid.

(*p*) Lind. 50.

(*q*) Athon, 52.

(*r*) Athon, 54.

ought in things or persons which wanteth to be corrected: and if they shall find any such, they shall correct the same either then or in the next chapter (s).

And their Officials.]—Here it seemeth to be intimated, that the archdeacon's official may visit; which yet is not true, at least in his own right; yet he may do this in the right of the archdeacon, when the archdeacon himself is hindered (t).

Stratford. "Forasmuch as archdeacons and other ordinaries in their visitations, finding defects as well in the churches as in the ornaments thereof and the fences of the churchyard and in the houses of the incumbents, do command them to be repaired under pecuniary penalties, and from those that obey not do extort the said penalties by censures, wherewith the said defects ought to be repaired, and thereby enrich their own purses to the damage of the poor people: therefore that there may be no occasion of complaint against the archdeacons and other ordinaries and their ministers by reason of such penal exactions, and that it becometh not ecclesiastical persons to gape after or enrich themselves with dishonest and penal acquisitions, we do ordain, that such penalties, so often as they shall be exacted, shall be converted to the use of such repairs, under pain of suspension *ab officio* which they shall *ipso facto* incur until they shall effectually assign what was so received to the reparation of the said defects (u)."

Canon 86. "Every dean, dean and chapter, archdeacon and others which have authority to hold ecclesiastical visitations by composition, law or prescription, shall survey the churches of his or their jurisdiction once in every three years in his own person, or cause the same to be done; and shall from time to time, within the said three years, certify the high commissioners for causes ecclesiastical, every year, of such defects in any the said churches as he or they do find to remain unrepaired, and the names and surnames of the parties faulty therein. Upon which certificate we desire the said high commissioners will *ex officio mero* send for such parties and compel them to obey the just and lawful decrees of such ecclesiastical ordinaries making such certificates."

Note, since the making of these canons, the high commission court was abolished by act of parliament.

Visitation
Sermon.

In the year 1626, Mr. Huntley, rector of Stourmouth, was required by Dr. Kingsley, archdeacon of Canterbury, to preach a visitation sermon, which he refused: and being cited before the high commissioners, it was urged that he was bound to the performance of that office in pursuance of the archdeacon's mandate, by virtue of his oath of canonical obedience. He answered that he was not a licensed preacher according to the canons of 1603, and especially that he was not bound there-

(s) Lind. 53.

(t) Lind. 53.

(u) Lind. 224.

unto by his said oath, which implieth only an obedience according to the canon law, as it is in force in this realm; and that there is no canon, foreign or domestic, which requireth him to do this; but on the contrary, that the ancient canon law injoineth the visitor himself to preach at his own visitation. But the court admonished him to comply; and on his refusal, fined him 500*l.*, and imprisoned him till he should pay the same, and also make submission; and afterwards degraded and deprived him (*x*).

But this perhaps may be one instance, amongst others, charged against that court whilst it subsisted, of carrying matters with a pretty high hand.

And Dr. Ayliffe observes, from the sixth book of the Decretals, that amongst the orders to be observed by archbishops, bishops and others in their visitations, the first is, that they ought to preach the word of God by giving the congregation a sermon (*y*).

Nevertheless, it is presumed, very few clergyman would refuse to discharge the offices of their function on the like occasion, at the request or intimation of their superior.

Canon 137. "Forasmuch as a chief and principal cause and use of visitation is, that the bishop, archdeacon or other assigned to visit, may get some knowledge of the state, sufficiency and ability of the clergy and other persons whom they are to visit: we think it convenient that every parson, vicar, curate, schoolmaster or other person licensed whosoever, do at the bishop's first visitation, or at the next visitation after his admission, show and exhibit unto him his letters of orders, institution and induction, and all other his dispensations, licences or faculties whatsoever, to be by the said bishop either allowed, or (if there be just cause) disallowed and rejected, and being by him approved, to be (as the custom is) signed by the register: and that the whole fees accustomed to be paid in the visitations in respect of the premises be paid only once in the whole time of every bishop, and afterwards but half of the said accustomed fees in every other visitation during the said bishop's continuance." Exhibits.

To be by the said Bishop allowed.]—None but the bishop or other person exercising ecclesiastical authority by commission from him, hath right *de jure communi* to require these exhibits of the clergy; nor doth the enacting part of this canon convey the right to any other; and therefore if any archdeacons are entitled to require exhibits in their visitations, it must be upon the foot of custom, the beginning whereof hath probably been an encroachment; since it is not likely that any bishop should give to the archdeacon and his official a power of allowing or disallowing such instruments as have been granted by himself or his predecessors (*z*).

(*x*) Johns., *Huntley's case*. (*y*) Ayl. Par. 515. (*z*) Gibs, 959.

Whole Fees.]—In the registry of Archbishop Islip, there is a sequestration of the benefices of divers clergymen refusing to make due exhibits in a visitation (a).

And afterwards but Half of the said accustomed Fees.]—Lindwood, speaking of the letters of orders to be exhibited by stipendiary curates going from one diocese to another, saith, that after the archdeacon or his official or other ordinary hath satisfied himself of their orders and of their life and conversation, they may be admitted to officiate, and their names ought to be entered in the register of such ordinary; whereupon in other visitations or inquiries, their letters of orders ought not to be reinspected, nor their names to be entered again, seeing they are sufficiently known already: and so they do ill (he says) who in every of their visitations take something for the inspection and approbation of the said letters of orders, seeing such entry ought not to be made but once, namely, at the first admission (b).

Presentments
by whom to
be made.

Edm. There shall be in every deanry two or three men, having God before their eyes, who shall at the command of the archbishop or his official, present unto them the public excesses of prelates and other clerks (c).

In every Deanry.]—That is, in every rural deanry (d).

Public excesses.]—That is, notorious, whereof there is great and public infamy; and this, although the same be not upon oath; but if such excesses shall not be notorious, then the same shall not be presented, unless there be proof upon oath (e).

As to the churchwardens' duty in this particular, although they have for many hundred years been a body corporate to take care of the goods, repairs and ornaments of the church, as appears by the ancient register of writs; yet this work of presenting hath been devolved on them and their assistants by canons and constitutions of a more modern date. Anciently the way was to select a certain number, at the discretion of the ordinary, to give information upon oath; which number the rule of the canon law upon this head evidently supposeth to have been selected while the synod was sitting, and the people as well as clergy in attendance there. But in process of time this method was changed, and it was directed in the citation that four, six or eight, according to the proportion of the district, should appear (together with the clergy) to represent the people, and to be the *testes synodales* (f).

But all this while we find nothing of churchwardens presenting, but the style of the books is, "The parishioners say," "The laymen say," and the like, until a little before the Reformation, when the churchwardens began to present, either by themselves, or else with two or three more parishioners of

(a) Gibs. 1545.

(b) Lind. 225; Gibs. 959.

(c) Lind. 277.

(d) Ibid.

(e) Lind. 227.

(f) Gibs. 960. See title **Churchwardens**.

credit joined with them. And this last (by the way) is evidently the origin of that office which our canons do call the office of sidemen or assistants (*g*).

In the beginning of the reign of King James the First, a commissary had cited many persons of several parishes to appear before him at his visitation; and because they appeared not, they were excommunicated. But a prohibition was granted, because the ordinary hath not power to cite any into that court, except the churchwardens and sidemen (*h*).

But by canon 113, "Because it often cometh to pass, that churchwardens, sidemen, questmen and such other persons of the laity as are to take care for the suppressing of sin and wickedness, so much as in them lieth, by admonition, reprehension and denunciation to their ordinaries, do forbear to discharge their duties therein, either through fear of their superiors, or through negligence, more than were fit, the licentiousness of these times considered, we do ordain, that hereafter every parson and vicar, or, in the lawful absence of any parson and vicar, then their curates and substitutes, may join in every presentment with the said churchwardens, sidemen and the rest above-mentioned, at the times of visitation, if they the said churchwardens and the rest will present such enormities as are apparent in the parish: or if they will not, then every such parson and vicar, or in their absence as afore-said their curates, may themselves present to their ordinaries at such times, and when else they think it meet, all such crimes as they have in charge or otherwise, as by them (being the persons that should have the chief care for the suppressing of sin and impiety in their parishes) shall be thought to require due reformation: provided always, that if any man confess his secret and hidden sins to the minister, for the unburdening of his conscience, and to receive spiritual consolation and ease of mind from him, we do not any way bind the said minister by this our constitution, but do straightly charge and admonish him, that he do not at any time reveal and make known to any person whatsoever any crime or offence so committed to his trust and secrecy (except they be such crimes as by the laws of this realm his own life may be called in question for concealing the same) under pain of irregularity."

And by canon 116, "It shall be lawful for any godly disposed person, or for any ecclesiastical judge, upon knowledge or notice given unto him or them, of any enormous crime within his jurisdiction, to move the minister, churchwardens or sidemen, as they tender the glory of God and reformation of sin, to present the same, if they shall find sufficient cause to induce them thereunto, that it may be in due time punished and reformed."

Provided, that for these voluntary presentments there be no fee required or taken.

(*g*) Gibs. 960.

(*h*) Noy, 123.

To be made
upon Oath.

Boniface. "We do decree, that laymen, when inquiry shall be made by the prelates and judges ecclesiastical for correcting the sins and excesses of those that are within their jurisdiction, shall be compelled (if need be) to take an oath to speak the truth (*i*).

And that ordinaries are empowered by the laws of the church to require an oath of the *testes synodales*, appears not only from this constitution, but also from the body of the canon law. And the same practice of administering an oath appears in the ecclesiastical records of our own church, where it is often entered, that the presenters were charged upon their consciences to discover whatever they knew to want amendment in things and persons (*k*).

[Oaths on taking the office of churchwarden are abolished, and a declaration substituted in their stead by sect. 9 of 5 & 6 Geo. 4, c. 62 (*l*).—ED.]

Articles of
Inquiry.

Can. 119. "For the avoiding of such inconveniences as heretofore have happened by the hasty making of bills of presentments upon the days of visitation and synods, it is ordered, that always hereafter, every chancellor, archdeacon, commissary and official, and every other person having ecclesiastical jurisdiction, at the ordinary time when the churchwardens are sworn, and the archbishop and bishops, when he or they do summon their visitation, shall deliver or cause to be delivered to the churchwardens, questmen and sidemen of every parish, or to some of them, such books of articles as they or any of them shall require (for the year following), the said churchwardens, questmen and sidemen to ground their presentments upon, at such times as they are to exhibit them. In which book shall be contained the form of the oath which must be taken immediately before every such presentment; to the intent that having beforehand time sufficient, not only to peruse and consider what their said oath shall be, but the articles also whereupon they are to ground their presentments, they may frame them at home both advisedly and truly, to the discharge of their own consciences (after they are sworn) as becometh honest and godly men."

Frame them at Home.]—By an entry in one of our records about 200 years ago, the ancient way of making presentments seems to have been the ordinary's examination of the synodal witnesses, and the taking their directions and presentments by word of mouth, and then immediately entering them in the acts of the visitation. And although presentments are now required to be framed at home, there is no doubt but every visitor hath the same right of personal examination that ancient visitors had, as often as he shall find occasion (*m*).

By reason of several disputes which have been made con-

(*i*) Lind. 109.

(*k*) Gibs. 960.

(*l*) [See title *Oaths*, vol. iii.]

(*m*) Gibs. 963.

cerning the articles of inquiry, the convocation hath sometimes attempted to frame one general body of articles for visitations, but the same as yet hath not been brought to effect (*n*).

Can. 115. "Whereas for the reformation of criminous persons and disorders in every parish, the churchwardens, questmen, sidemen, and such other church officers are sworn, and the minister charged to present as well the crimes and disorders committed by the said criminous persons, as also the common fame which is spread abroad of them, whereby they are often maligned and sometimes troubled by the said delinquents or their friends, we do admonish and exhort all judges both ecclesiastical and temporal, as they regard and reverence the fearful judgment-seat of the highest Judge, that they admit not in any of their courts, any complaint, plea, suit or suits, against any such churchwardens, questmen, sidemen or other church officers, for making any such presentments, nor against any minister for any presentments that he shall make; all the said presentments tending to the restraint of shameless impiety, and considering that the rules both of charity and government do presume that they did nothing therein of malice, but for the discharge of their consciences."

Presentments
on common
Fame.

But there is more danger now than when these canons were made of actions being brought against churchwardens for presenting upon common fame, because the person accused in those days was required to answer upon oath to the charge laid against him, and to bring his compurgators; but the oath *ex officio* being now abolished, it seemeth not safe to present any person upon common fame only without proof (*o*).

And even when the oath of purgation was in force, Mr. Clerke gives a caution, that all, both churchwardens and others, take care, how they accuse or present any person for any crime or fame thereof, unless they can prove either the crime, or that the fame thereof arose from just causes and strong presumptions. Therefore, although the fame or rumour of any crime hath been spread amongst many and good men, yet if it had its beginning from enemies or evil-minded persons, or (as is often the case) from the sole accusation of a woman confessing her own turpitude, the presentment or accusation in such case ought not to be general, but particular, that is, that such a fame or rather rumour was spread by such persons, or by the accusation or confession of such woman in child-birth confessing her own baseness; and then, if the person accused shall proceed against the accuser in a cause of defamation, he shall fail in his suit if proof shall be made that there was such a fame or rumour as was set forth in the presentment (*p*).

It is not enough to present that such a one hath committed fornication, or the like, but the person ought to be named with

Presentments
in what man-
ner to be
made.

(*n*) Gibs. 962.

and 17.

(*o*) See title Churchwardens, 8

(*p*) 1 Ought. 236.

whom he committed the offence, and that there is a public fame thereof; otherwise upon such a general and uncertain presentment, the person accused cannot know how to make his defence, and there may be cause of appeal (*q*).

At what
Time to be
made.

Can. 116. "No churchwardens, questmen, or sidemen of any parish, shall be enforced to exhibit their presentments to any having ecclesiastical jurisdiction, above once in every year where it hath been no oftener used, nor above twice in every diocese whatsoever, except it be at the bishop's visitation; provided always, that as good occasion shall require, it shall be lawful for every minister, churchwarden and sideman to present offenders as oft as they shall think meet, and for these voluntary presentments no fee shall be taken."

Can. 117. "No churchwardens, questmen or sidemen shall be called or cited, but only at the said time or times before limited, to appear before any ecclesiastical judge whosoever, for refusing at other times to present any faults committed in their parishes, and punishable by ecclesiastical laws. Neither shall they or any of them, after their presentments exhibited at any of those times, be any further troubled for the same, except upon manifest and evident proof it may appear that they did then willingly and wittingly omit to present some such public crime or crimes as they knew to be committed, or could not be ignorant that there was then a public fame of them, or unless there be very just cause to call them for the explanation of their former presentments; in which case of wilful omission, their ordinaries shall proceed against them in such sort, as in causes of wilful perjury in a court ecclesiastical it is already provided."

Can. 118. "The office of all churchwardens and sidemen shall be reputed to continue until the new churchwardens that shall succeed them be sworn, which shall be the first week after Easter, or some week following, according to the direction of the ordinary; which time so appointed shall always be one of the two times in every year when the minister and churchwardens and sidemen of every parish shall exhibit to their several ordinaries the presentments of such enormities as have happened in their parishes since their last presentments. And this duty they shall perform before the newly chosen churchwardens and sidemen be sworn, and shall not be suffered to pass over the said presentments to those that are newly come into that office, and are by intendment ignorant of such crimes; under pain of those censures which are appointed for the reformation of such dalliers and dispensers with their own consciences and oaths."

Fee for
taking in Pre-
sentments.

Can. 116. "For the presentments of every parish church or chapel, the register of any court where they are to be exhibited shall not receive in one year above 4*d.*; under pain, for every

offence therein, of suspension from the execution of his office for the space of a month *toties quoties*."

Besides being proceeded against by the censures of the church, it is enjoined by canon 26, that no minister shall in any wise admit to the receiving of the holy communion any churchwardens or sidesmen, who, having taken their oaths to present to their ordinaries all such public offences as they are particularly charged to inquire of in their several parishes, shall (notwithstanding their said oaths, and that their faithful discharge of them is the chief means whereby public sins and offences may be reformed and punished) wittingly and willingly, desperately and irreligiously, incur the horrible crime of perjury, either in neglecting or in refusing to present such of the said enormities and public offences as they know themselves to be committed in their said parishes, or are notoriously offensive to the congregation there, although they be urged by some of their neighbours, or by their minister, or by the ordinary himself, to discharge their consciences by presenting of them, and not to incur so desperately the said horrible sin of perjury.

Penalty for
not Pre-
senting.

H., 1680, *Selby's case* (r). A prohibition was prayed to the archdeacon of Exeter, because he proceeded to excommunicate the plaintiff, for that he, being churchwarden, refused to present a notorious delinquent, being admonished. And a prohibition was granted: for they are not to direct the churchwarden to present at their pleasure; but if one churchwarden doth refuse to present, he may be presented by his successor.

Can. 121. "In places where the bishop and archdeacon do by prescription or composition visit at several times in one and the same year, lest for one and the self same fault any of his majesty's subjects should be challenged and molested in divers ecclesiastical courts, we do order and appoint, that every archdeacon or his official, within one month after the visitation ended that year, and the presentments received, shall certify under his hand and seal, to the bishop or his chancellor, the names and crimes of all such as are detected and presented in his said visitation, to the end the chancellor shall henceforth forbear to convent any person for any crime or cause so detected or presented to the archdeacon. And the chancellor, within the like time after the bishop's visitation ended and presentments received, shall under his hand and seal signify to the archdeacon or his official the names and crimes of all such persons, which shall be detected or presented unto him in that visitation, to the same intent as aforesaid. And if these officers shall not certify each other as is here prescribed, or after such certificate shall intermeddle with the crimes or persons detected and presented in each other's visitation; then every of

None to be
presented
twice for the
same Offence.

(r) Freem. 298.

them so offending shall be suspended from all exercise of his jurisdiction, by the bishop of the diocese, until he shall repay the costs and expences which the parties grieved have been at by that vexation."

Churchward-
ens to support
their Present-
ments.

Crimes evident and notorious, whether they be immoralities in persons, as lewdness, swearing, drunkenness, and such like; or defects in places, as the want of repairs, or of utensils, in churches, churchyards, and parsonage houses; are not only in their nature merely spiritual and ecclesiastical, but in the chief heads thereof (as fornication, adultery, and the repairing of churches and churchyards), by the statute of *Circumspectè agatis*, 13 Edw. 1, not liable to prohibition. And therefore, if offenders, being presented, do escape unpunished, it must be owing either to the want of proof, or the want of prosecution (s).

As to legal proof, in case the party presented denies the fact to be true, the making good the truth of the presentment, that is, the furnishing the court with all proper evidences of it, undoubtedly rests upon the person presenting. And as the spiritual court in such case is entitled by law to call upon churchwardens to support their presentments, so are churchwardens obliged not only by law (Dr. Gibson says), but also in conscience, to see the presentment effectually supported; because to deny the court those evidences which induced them to present upon oath, is to desert their presentment, and is little better, in point of conscience, than not to present at all; inasmuch as through their default the presentment is rendered ineffectual, as to all purposes of removing the scandal, or reforming the offender. And from hence he takes occasion to wish, that the parishioners would think themselves bound (as on many accounts they certainly are bound) to support their churchwardens, in seeing that their presentments are rendered effectual. In any point which concerns the repairs or ornaments of churches, or the providing conveniences of any kind for the service of God, when such defects as these are presented, the spiritual judge, immediately, and of course, enjoins the churchwarden presenting, to see the defect made good, and supports him in repaying himself, by a legal and reasonable rate upon the parish. But what he intends is, the supporting the churchwardens in the prosecution of such immoral and unchristian livers, as they find themselves obliged by their oath to present, as fornicators, adulterers, common swearers, drunkards, and such like, whose example is of pernicious consequence, and likely to bring many evils upon the parish (t).

Procurations.

In all visitations of parochial churches made by bishops and archdeacons, the law hath provided that the charge thereof shall be answered by the procurations then due and payable by

(s) Gibs. 966.

(t) Ibid.

the inferior clergy; wherein custom, as to the quantum, shall prevail (*u*).

These procurations were anciently made by *procuring* victuals and other provisions in specie; concerning which the following constitutions have been ordained:—

Anciently by
Provisions in
Kind.

Langton. "We forbid archdeacons, deans, and their officials, to make any exactions upon their clergy (*x*)."

Langton. "That archdeacons may not be burdensome to the churches subject unto them, we strictly enjoin that they do not exceed the number of horses and men prescribed by the general council; and that they do not presume to invite strangers with them to the procuration made for them on account of their visitation. But if the rectors of the churches, in honour of the archdeacon, will invite any, we do not forbid it. But the archdeacons themselves shall invite none, lest they who would not burden the churches by their own coming, should yet burden them by those whom they should invite. And that there may be no occasion to invite any, we do forbid the archdeacons to hold any chapter on the day of visitation at the church which they visit, unless it be in a borough or city. And we enjoin the archdeacons, that they do not in any wise receive procuration without reasonable cause, but only on the day when they personally visit the church; and that they do not extort money from the church as a fee or ransom for not visiting (*y*)."

Prescribed by the General Council.]—That is to say, five or six; but herein a regard ought to be had to the custom of the country or place (*z*).

In any wise.]—That is, neither in victuals, nor money, nor any thing in lieu thereof (*a*).

Personally visit.]—But yet, if through infirmity or any other lawful cause, the archdeacon be hindered from visiting in person, he may exercise the office by another; and in such case the procurations shall be paid (*b*).

Othob. "The archdeacons shall not burden the churches with superfluous expences, but only require moderate procurations when they visit; and shall not bring strangers with them, but demean themselves modestly both in regard to their attendants and their horses (*c*)."

Othob. "The church visited ought in reason to entertain the visitor; but where no visitation is, there shall be no procuration; and if any person shall take any thing, he shall be suspended from the entrance of the church until he make restitution. And the bishops and other inferior prelates, when they visit, shall not burden the clergy with a superfluous number of attendants or horses, or otherwise, in expences; and if they do, the clergy shall not obey them in that behalf; and any sentences of

(*u*) God. Introd. 19.

(*x*) Lind. 221.

(*y*) Lind. 219.

(*z*) Lind. 220.

(*a*) Ibid

(*b*) Lind. 221.

(*c*) Athon, 53.

excommunication, suspension, or interdict, on occasion thereof, shall be void (*d*)."

Stratford. "No procuration shall be due without actually visiting; and if any shall visit more churches than one in one day, he shall have but one procuration, to be proportioned amongst the said churches. And because sometimes the retinue of a visitor exceedeth the number of men and horses appointed by the canons, so that they who pay their procurations in victuals are excessively burdened beyond the rate which is usually paid in money, it shall be in the choice of the visited to pay the same in money or in provisions (*e*)."

Procurations
now con-
verted into
Money.

And this last constitution, by putting it in the choice of the incumbent, whether he would entertain the visitor in provisions or compound for it by a certain sum of money, was the cause of the custom generally prevailing afterwards, and which now universally obtaineth, of a fixed payment in money, instead of a procuration in meat, drink, provender, and other accommodation (*f*).

["These proxies are now part of the settled revenue of the bishop's see; the king himself pays them for his appropriations, as the abbeyes did before the dissolution when they had appropriated churches. In the great Irish case of procurations, 2 Jac. 1, *The King v. Sir Ambrose Forth* (*g*), it was held (*h*), first, that as the service of the tenant in repairing a castle, having been commuted into a money rent, is payable though the castle is demolished (*i*); so for the same reason, though benefices impropriate become a lay fee, and being in lay hands are not visitable, and though religious houses are suppressed, still the ascertained sums given as and retaining the name of procurations, and by ancient composition made parcel of the settled revenues of a bishop, shall remain for ever without being subject to extinguishment. Nor shall their origin be examined or brought into question, more than that of pensions or portions of tithes arising out of many abbeyes and impropriate rectories. Secondly (*k*), that procurations being in their original nature duties payable for visitation, were grantable to the king as head of the church, who might take the same, specially because the said duties were converted into a sum certain in the nature of a pension; and that being so grantable to the king, a *bishop* might so grant the same, being part of his see (*l*). Thirdly (*m*), that the unity of possession of procurations with the impropriate rectories by the religious houses out of which the procurations are payable, does not extinguish the latter in

(*d*) Athon, 114.

(*e*) Lind. 223.

(*f*) Gibs. Tracts, 13.

(*g*) [Davy's Rep. 1.]

(*h*) [P. 3.]

(*i*) [Sir William Capel's case, cited 4 Rep. 88 a.]

(*k*) [Page 4.]

(*l*) [13 Eliz. c. 10, s. 3, is *contra* in England.]

(*m*) [Davy's Rep. p. 4.]

the hands of the king, but suspends the payment thereof for the time, till the king by his grant severs one from the other: and this (*n*) is assimilated to the case of tithes. For as tithes are due to lay persons who have purchased impropriate rectories, though they give no instruction (which was the origin of tithes); so proxies are due to ordinaries out of the impropriations of the dissolved religious houses, though their visitation has ceased."

—ED.]

Procurations are due to the person visiting, of common right; and although originally due by reason of visitation only, yet the same may be due without actual visitation. The foregoing constitutions limit the payment, whether in provisions or money, to actual visitation, and warrant the denial of them when no visitation is held. Upon which a doubt hath been raised, whether those archdeacons who are not permitted to visit, but are inhibited from doing it in the bishop's triennial visitation, have a right to require procurations for that year. They who have maintained the negative, build their opinion upon the express letter both of the ancient canon law, and of our own provincial constitutions. But others, who undertake to defend the rights of the archdeacons, allege, that though it might be reasonable that they lose their procurations, in case they neglect their office of visiting (which, by the way, was all that the ancient constitutions meant), yet that reason doth not hold when they are restrained and inhibited from it; and that procurations are rated in the valuation of King Henry VIII. as part of the revenues of every archdeacon, who therefore pays a certain annual tenth for them; and the law could never intend the payment of the tenth part every year, if there had been any year in which he was not to receive the nine parts. Which two arguments (Dr. Gibson says) are so strong in favour of the archidiaconal rights, the first in reason, and the second in law as well as reason, that no more need to be said upon that head (*o*).

Whether due when no Visitation is made.

Procurations are suable only in the spiritual court, and are merely an ecclesiastical duty (*p*).

To be sued for in the Spiritual Court.

And may be levied by sequestration or other ecclesiastical process (*q*).

E., 7 Geo. 1, *Saunderson v. Clagett* (*r*). Dr. Clagett, Archdeacon of Sudbury, commenced a suit in the Consistory Court of the Bishop of Norwich, against Saunderson, as proprietor or curate of the impropriate rectory of Aspal in Suffolk, for the annual sum of 6s. 8d. as a procuration or proxy due to the archdeacon for visitations. Saunderson moved the court of King's Bench for a prohibition, and suggested that this rectory of Aspal was time out of mind a rectory impropriate, without any vicar endowed; that all the tithes and profits within this rectory time out of mind belonged to the proprietor thereof,

To be paid by Rectories impropriate where there is no Vicar endowed.

(*n*) [Davy's Rep. p. 6.]

(*o*) Gibs. 975.

(*p*) Lord Raym. 450.

(*q*) Gibs. 1546.

(*r*) 1 P. W. 657; Str. 421.

who at his own expense used to provide a curate to celebrate divine service at the parish church of Aspal. But it was denied by the whole court, who delivered their opinions *seriatim*: 1, That this was an ecclesiastical duty, and therefore properly suable for in the spiritual court: 2, That it was claimed both by and from an ecclesiastical person, which made it the stronger: 3, That though there was an impropriation in the case, still there must be a curate to take care of the souls of the parishioners, and that curates as well as other persons must stand in need of bishop's or archdeacon's instructions and visitation: consequently, 4, That the ordinary or archdeacon ought to be allowed for his procuration what had been usually paid for it, which here appeared to be 6s. 8d.: 5, That where a thing is claimed by custom in the spiritual court, it must be intended according to their construction of a custom; and by their law, forty years make a custom or prescription.

Impropriate Rectory where there is a Vicar endowed.

Chapel of Ease under a Parochial Church.

Churches newly erected.

Places exempted.

If there be a parsonage and a vicarage endowed, only one is to pay procurations; but which of them must pay is to be directed by custom, or the endowment, if extant (s).

Stratford. A chapel of ease shall be included in the procuration of the mother church (t).

Churches newly erected shall be rated to procurations, according to the portion paid by the neighbouring churches (u).

Donatives and free chapels pay no procurations to any ecclesiastical ordinary, because they are not visitable by any (x).

Places exempted as to other matters are treated of under the title *Peculiars*.

Synodals or *cathedratica* and *pentecostals*, are treated of under their respective titles.

[IV. *Royal Visitations* (y).

The King by Commission may visit Colleges, Hospitals, and Places] exempt, and not the Archbishop of Canterbury.

[The 25 Hen. 8, c. 21, taking the power of dispensations from the pope, and vesting them in the Archbishop of Canterbury, intituled, "An Act concerning Peter-pence and Dispensations," provided by section 20, that neither the Archbishop of Canterbury, nor any other person, should have "power or authority by reason of this act, to visit or vex any monasteries, abbeys, priories, colleges, hospitals, houses or other places religious, which be or were exempt before the making of this act; any thing in this act to the contrary thereof notwithstanding; but that redress, visitation and confirmation shall be had by the king's highness, his heirs and successors, by commission under the great seal, to be directed to such persons as shall be appointed requisite for the same, in such monasteries, colleges, hospitals, priories, houses and places religious ex-

(s) Deg. p. 2, c. 15.

(t) Lind. 223; Deg. p. 2, c. 15.

(u) Gibs. 976.

(x) Deg. p. 2, c. 15.

(y) [The King's Visitatorial Power Asserted, by Nathaniel Johnston, London, 1648.—Ed.]

empt: so that no visitation nor confirmation shall from thenceforth be had or made, in or at any such monasteries, colleges, hospitals, priories, houses and places religious exempt by the said Bishop of Rome, nor by any of his authority, nor by any out of the king's dominions; nor that any person, religious or other, resiant in any the king's dominions, shall from henceforth depart out of the king's dominions to or for any visitation, congregation or assembly for religion, but that all such visitations, congregations and assemblies shall be within the king's dominions."

None shall go forth of England to General Councils.

[And chapter 17 of the same monarch (37 Hen. 8), "A Bill to enable Doctors of Civil Law to marry, and to exercise Ecclesiastical Jurisdiction," enacts by section 3,

["But forasmuch as your majesty is the only and undoubted supreme head of the Church of England, and also of Ireland, to whom by holy scripture all authority and power is wholly given to hear and determine all manner causes ecclesiastical, and to correct vice and sin whatsoever, and to all such persons as your majesty shall appoint thereunto."

[And the statute of 1 Eliz. c. 1, "An Act to restore to the Crown the ancient Jurisdiction over the Estate Ecclesiastical and Spiritual, and abolishing all Foreign Powers repugnant to the same," enacts by sections 17 and 18,

["And that also it may likewise please your highness, that it may be established and enacted by the authority aforesaid, that such jurisdictions, privileges, superiorities and pre-eminences spiritual and ecclesiastical, as by any spiritual or ecclesiastical power or authority hath heretofore been, or may lawfully be exercised or used for the visitation of the ecclesiastical state and persons, and for reformation, order and correction of the same, and of all manner of errors, heresies, schisms, abuses, offences, contempts, and enormities, shall for ever by authority of this present parliament be united and annexed to the imperial crown of this realm.

Ecclesiastical Jurisdiction annexed to the Crown.

["And that your highness, your heirs and successors, kings or queens of this realm, shall have full power and authority by virtue of this act, by letters patents under the great seal of England, to assign, name and authorize, when and as often as your highness, your heirs or successors, shall think meet and convenient, and for such and so long time as shall please your highness, your heirs or successors, such person or persons being natural-born subjects to your highness, your heirs or successors, as your majesty, your heirs or successors, shall think meet, to exercise, use, occupy and execute under your highness, your heirs and successors, all manner of jurisdictions, privileges and pre-eminences, in anywise touching or concerning any spiritual or ecclesiastical jurisdiction, within these your realms of England and Ireland, or any other your highness' dominions and countries: and to visit, reform, redress, order, correct and amend all such errors, heresies, schisms, abuses, offences, contempts and enormities whatsoever, which by any manner of spiritual or ecclesiastical power, authority or jurisdiction can or may lawfully be reformed, ordered, redressed, corrected, restrained

The Queen may assign Commissioners to exercise Ecclesiastical Jurisdiction.

or amended, to the pleasure of Almighty God, the increase of virtue, and the conservation of the peace and unity of this realm; and that such person or persons so to be named, assigned, authorized and appointed by your highness, your heirs or successors, after the said letters patents to him or them made and delivered, as is aforesaid, shall have full power and authority by virtue of this act, and of the said letters patents under your highness, your heirs and successors, to exercise, use and execute all the premises, according to the tenor and effect of the said letters patents; any matter or cause to the contrary in anywise notwithstanding."

[*To assign, name, and authorize.*—Lord Coke said, it was resolved by all the judges, that if this act had never been made, the king or queen of England for the time being might have made such an ecclesiastical commission by the ancient prerogative and law of England (*y*); but Bishop Stillingfleet (*z*) denies that "our ancient law doth give the king a power, by virtue of his ecclesiastical jurisdiction, to appoint commissioners, by an extraordinary way of jurisdiction, to proceed *in primâ instantiâ* against parsons by ecclesiastical censures;" and Bishop Gibson agrees with this learned prelate.

[*To visit.*—“This branch was enacted out of necessity, for that the bishops and most of the clergy being then popish, it was necessary to raise a commission to deprive them who would not deprive themselves, and to have a more summary proceeding than by the ordinary and prolix course of law is required. To this effect my Lord Coke. But Bishop Stillingfleet believes that they were either deprived by a particular commission for that purpose; which the queen might grant in virtue of this act by the same reason that she issued particular commissions into every county to execute the powers contained and specified in the said act.”

Ireland.

[“In Ireland, so early as the thirteenth century, a visitation was made of the archdiocese of Dublin, the record of which visitation is generally styled the ‘*Crede Mihi*’; copies of this document still exist, and by one of them, in the British Museum, it appears that the original was written about the end of the reign of Henry III. Soon after, a general survey or valuation of the churches of Ireland was instituted, as is found by some fragments of the valuation still remaining in the Exchequer in England: the valuation so made is generally called ‘Pope Nicholas’ Taxation,’ and was executed in the reign of Edward I.; there is a writ from King Edward III. ordering a new visitation of the diocese of Ireland to be made, though no such visitation has as yet been discovered. The most important document of that description which next occurs, is the ‘*Repertorium Viride*,’ or account of the former and present state of his own archdiocese, made by John Alan, Archbishop of Dublin, in the reign of Henry VIII. The original record,

(*y*) [5 Rep. *Caudrey's case*.]

(*z*) [Eccles. Cases, part 2, p. 67.]

thus compiled, has continued in the possession of the archbishop's successors; and when we find copies of it were made for preservation in the libraries of Christ Church and Saint Patrick's Cathedrals, Trinity College, &c. where they now remain, we may fairly presume it was formerly a document in considerable estimation. During the reign of Queen Elizabeth, many visitations of the dioceses of Ireland were made; some of them pursuant to order of state, and records of most of them are still to be seen in the Manuscript Library of Trinity College. In the time of her successor, James I., viz. in the years 1607, 1612, and 1615, visitations were made throughout the kingdom, some of them pursuant to a commission now enrolled on the rolls of Chancery, and agreeably to instructions issued in writing for holding those visitations, as may be seen by a copy of those instructions, annexed to the visitations themselves, in the prerogative registry; but in 1622 the same king, by a commission under the great seal of England, empowered a certain number of persons, some of them leading members of the English parliament, to inquire into and report upon the state of the Church in Ireland, as well as to do and perform the many other high and arduous duties which are minutely detailed in that commission. Copies of some of the visitations and returns made accordingly, will be found in the British Museum, St. Patrick's Library, and amongst the manuscripts in the College Library, Dublin. Soon after those returns, viz. in the year 1623, King James issued his 'Rules and Orders' for the Church of Ireland, a copy of which will be found in St. Patrick's Library. A new regal visitation was made in the years 1633, 1634, and this, with the 'Munster Visitation' records of the same period, both now remaining in the prerogative registry, seem to be almost the fullest specimens of ancient ecclesiastical returns or reports now existing. In the preparing of these last visitations, besides the names of the parishes, incumbents, patrons, impropriators, or 'farmers,' as they frequently style the grantees of the dissolved monasteries, much useful information, taken from the bishop's registry, then extant, will be found annexed to most of the returns respecting the collations, presentations, nominations, admissions, institutions, inductions, &c. of the several incumbents and curates. The triennial visitations of the Deans of Kilmore, Ardagh, Dromore and Connor, made in the year 1673, are also preserved in the same registry. No other general visitations appear to have been made in Ireland until after the Revolution, when in or about the year 1693, the lords justices issued directions to the archbishops and bishops throughout the kingdom, and reports and returns were made in consequence; copies of some of those returns are preserved in St. Patrick's Library, Dublin, and also in the primatial registry at Armagh. The above are the principal ecclesiastical returns, surveys, or visitations heretofore made in Ireland, but of course they do not

include those annual and triennial visitations made of the respective sees, many of which are still to be seen in the diocesan registries; several other miscellaneous ecclesiastical returns and documents are preserved amongst the archiepiscopal records in Lambeth Palace, and amongst the Clarendon and other collections in the British Museum; the surveys of the impropriate tithes made under the commonwealth government, are preserved at Bective House, in the county Meath, with the other valuable and interesting records belonging to the most noble the Marquess of Headfort, and some of them are also at present in the Castle of Dublin. Most of the original valuations of spiritual benefices made in the reign of Henry VIII. and his successors, for ascertaining the first fruits payable to the crown out of such benefices, will be found amongst the inquisitions in the Chief Remembrancer's Office, and from those inquisitions, held specially for the purpose, an abstract compilation was at a more recent period formed, which has since been termed the '*Valor Beneficiorum*.'

[“On the escheat of the northern counties in the reign of James I., inquisitions were also held, which afford most curious and useful information as to the situation, division and application of tithes and other church property in those counties, at and before that period (z).”—Ed.]

Visitation of the Sick—See Sick.

Uniformity—See Publick Worship.

Union (a).

Causes of
Union.

THE union or consolidation of churches ought to be founded upon good canonical reasons. And the principal reasons assigned by the canon law are, for hospitality, nearness of the places, want of inhabitants, poverty or smallness of the living. Which circumstances are specially inquired into before the union, and (some, or all of them, as the case is) are recited in the preamble to the act of union (b).

Who may
unite.

And in such case, by the common law of the realm, the ordinaries, patrons, and incumbents may make a consolidation or an union of the two churches into one (c).

And in such case it is said, that the consent of the king is

(z) [Cunningham's Ecclesiastical Precedents and Practice, Appendix, p. 369.—Ed.]

(a) [For union of sees, see title *Bishops*.]

(b) Gibs. 920; [Godolph. R. C. 29.]

(c) [*Harman v. Renew*,] 1 Salk. 165; Hughes, c. 28; [*Rex v. Archbishop of Armagh*, Str. 516.]

not at all necessary, albeit he hath an interest in the churches in the case of lapse. For by the ancient canon law, the licence of the pope was not necessary; nor hath the licence of the king been judged necessary since the Reformation; inasmuch as unions have been ordinarily made without such licence; however, in some few instances, it may have been desired and obtained for the greater caution (*d*).

[The 37 Hen. 8, c. 21 (*e*), and 17 Car. 2, c. 3, are, as will be seen, now repealed.] By the 4 Will. 3, c. 12, it was enacted, that where one of the churches united by virtue of the said last-mentioned act, was at the time of such union, or shall afterwards be demolished; in such case, as often as the church which is made the church presentative, and to which the union was made, shall be out of repair, or there shall be need of decent ornaments for the performance of divine service therein, the parishioners of the parish whose church shall then be down or demolished, shall bear and pay towards the charges of such repairs and decent ornaments, such share and proportion as the archbishop or bishop that shall make such union shall by the same union direct and appoint; and for want of such direction and appointment, then one third part of such charges of the repairs and decent ornaments which shall be made or provided; and the same shall be rated, taxed, and levied, and in default thereof such process and proceedings shall be made, as if it were for the reparation and finding decent ornaments for their own parish church, if no such union had been made.

But if both churches are standing, then the repairs and ornaments shall be provided for, as they were at the common law; that is, by the parishioners of each parish respectively (*f*).

[1 & 2 Vict. c. 106, s. 27,

“ And whereas the charges effected by virtue of the provisions aforesaid [for uniting or disuniting benefices, and for altering the contents of parishes, may, when the orders for those purposes respectively come into operation, raise doubts and create disputes not foreseen at the time when such orders may have been made respecting ecclesiastical jurisdiction, glebe lands, tithes, rent-charges, and other ecclesiastical dues, rates, and payments, patronage, right to pews, and the definition of local boundaries; be it enacted, That it shall be lawful for her Majesty in council, at any time within five years after such orders respectively shall come into full operation, if occasion shall arise, to make a supplemental order for removing such doubts and settling such disputes; and every such supplemental order shall have the same force and effect as if it had formed part of the original order made under the provisions of this

Power of
adjusting Dis-
putes arising
out of the
foregoing
Alterations.

(*d*) [*Austyn v. Twyne*,] Cro. Eliz. 500; *Gibs.* 916, 920; *Wats.* c. 16. *Bishop of Lincoln and Whitehead v. Wolverham*, 1 Bl. Rep. 494; Serj.

(*e*) [For authorities on the 37 Hen. 8, c. 21—*Gibs.* Cod. 970; *Page v. Bishop of London*, Cro. El. 719; Hill's MS. Notes; and 6 Taunt. 51.]

(*f*) *Gibs.* 919.

act: Provided always, that in every case in which the contents of parishes shall be so altered, such alteration shall not in any way affect the secular rates, taxes, charges, duties, or privileges of such parishes, or of any part of them."

[The provisions contained in the foregoing act are extended by 2 & 3 Vict. c. 49, which recites the 26th section of 1 & 2 Vict. adding,

[" Be it therefore enacted, That any such scheme or modification may be drawn up according to the regulations and directions in such act contained, subject to the consent in writing of the patron or patrons of the benefice or benefices to be affected thereby, under his or their hands, notwithstanding the vacancy of such benefice or benefices; and it shall be lawful for her Majesty in council thereupon to make an order for carrying such scheme, or modification thereof, as the case may be, into effect; and such order, being registered in the registry of the diocese as directed by the said act, shall come into operation and shall be forthwith binding on all persons whatsoever, notwithstanding such vacancy or vacancies."

Who are to be considered Patrons.

[Sect. 7. " That the provisions contained in the said last-recited act touching the party or parties who shall be considered patron or patrons, and the manner in which the consent of the patrons shall in certain cases be given, for the purposes of such act, shall apply to the consent of the patron or patrons hereinbefore last required to be given."

Where a separate Parish is constituted by Order in Council, the same shall be a Perpetual Curacy with Cure of Souls.

[Sect. 8. " That when by any order of her Majesty in council as aforesaid, a separate parish for ecclesiastical purposes is constituted, the same shall, on registration thereof, and with the consent in writing of the incumbent or incumbents of the benefice or benefices to be thereby affected, become a perpetual curacy and benefice, and the minister thereof, duly nominated and licensed thereto, and his successors, shall be a body politic and corporate, with perpetual succession, and may receive and take to himself and his successors all such lands, tenements, tithes, rent-charges, and hereditaments as shall be granted unto him or them, and such perpetual curate shall thenceforth have, within the limits of the district parish formed under the church building acts for the church of such perpetual curacy, sole and exclusive cure of souls, and shall not in anywise be subject to the control or interference of the incumbent or incumbents of the benefice or benefices to be affected by such order, if he or they shall have consented to such order as aforesaid; but if such incumbent or incumbents shall not have so consented thereto, this last-mentioned provision shall not come into operation until the next avoidance of the benefice by the incumbent objecting thereto, or by the surviving incumbent objecting, if more than one shall object thereto, and in such case the last-mentioned provision shall forthwith after such avoidance come into operation, and shall be binding on all persons whatsoever."

[The 4 & 5 Vict. c. 39, has for its object to explain and amend the acts (6 & 7 Will. 4, c. 77, and 3 & 4 Vict. c. 113) relating to the ecclesiastical commissioners for England, and it enacts by s. 23,

Exchanges of Advowsons

[" That whenever it shall be made to appear to the ecclesiastical

commissioners for England that it would be expedient to make an exchange of an advowson, or of any right of patronage, for any other advowson or right of patronage, with a view to proceedings being taken for the union of two or more benefices under the provisions of the said act passed in the second year of her present Majesty's reign, it shall be lawful for the said commissioners, with the consent of the patron or patrons of every such advowson or right of patronage, and also, in case any such advowson or right of patronage shall be vested in or belong to any ecclesiastical corporation, aggregate or sole, with the consent of the bishop of the diocese, or in the case of benefices lying in more than one diocese then with the consent of the bishop of each diocese, and where a bishop shall be himself one of the patrons with the consent of the archbishop of the province, to certify the same to such archbishop; and that thereupon, if the said archbishop shall think fit, proceedings may be taken, under and in pursuance of the provisions of the said last-mentioned act, for effecting the union of such benefices; and the said archbishop, at the same time that he shall certify to her Majesty in council the inquiry and consent referred to in the same act, shall transmit such certificate of the said commissioners to her Majesty in council, together with an abstract of the title to any advowson or right of patronage mentioned in the certificate of the said commissioners, other than advowsons or rights of patronage belonging to any such ecclesiastical corporation as aforesaid, and the opinion of counsel on such title; and that thereupon it shall be lawful for her Majesty in council, in any order for such licence made and issued under the provisions of the same act, to order that such exchange as aforesaid shall take effect; and upon such order being made and registered pursuant to the said act the said exchange shall be valid and effectual, without any other assurance in the law, and notwithstanding that the advowsons or rights of patronage, or any or either of them, exchanged by virtue of the said order, were or was previously thereto vested in or belonged to any such ecclesiastical corporation as aforesaid; and the respective exchangees, their heirs, appointees, successors, and assigns, shall thenceforth stand seised of the advowsons or rights of patronage so taken in exchange, in the same manner, to all intents and purposes, and subject to the same trusts, powers, limitations, charges, and incumbrances (if any), as the advowsons or rights of patronage by them given in exchange were respectively held and were subject."

may be made
for the Pur-
of Unions.

1 & 2 Vict.
c. 105, s. 16.

Unions *in futuro*, as well as *in præsenti*, are good. And therefore if two churches are full, and one is duly united to the other *in futuro*, when either shall become void, the surviving incumbent may enter upon the void living, without any other title than that which he received from the act of union (g).

Union may
be *in futuro*.

By the union of two churches, no change is made in the advowsons: that is, not only all rights are reserved to the patron or patrons, as before, but the nature of the advowsons continues the same; as, if one be appendant, and the other in gross, and that which is appendant is made the presentative church, and the patron of the church in gross hath the first

Presentation
to united Be-
nefices.

turn, yet shall not the whole advowson be in gross, but it shall remain appendant for his turn who was patron of the advowson appendant, and in gross for his turn who was patron of the advowson in gross. Which being so, (that is, the advowsons, not only as to the right, but even as to the nature of them, remaining the same as before,) it seems to be an unreasonable doubt, whether bishops and other ecclesiastical persons can consent to an union by the statutes of the 1 Eliz. and 13 Eliz. (*h*)

Reparations.

Two churches parochial being united at the common law, the reparations shall remain several as before. Which was the reason, why the aforesaid act of the 4 Will. 3 was found necessary, to make it otherwise in the churches that had been or should be united in virtue of the statute of the 17 Car. 2. For before that, the inhabitants, even of a demolished church, were not obliged to contribute to the reparations of the church remaining, to which they were united (*i*).

Other Payments and Duties.

The payment of first fruits and tenths, as before, are specially reserved in the aforesaid statutes: and the same, together with all other payments and duties to the bishop, archdeacon, and the like, and even the fees of institution, are reserved, of course, in perpetual unions, whether within the said statutes or not (*k*).

Effect of Union as to Pluralities.

By the union the two churches are become so much one, that a second benefice may be taken by dispensation within the statute of pluralities (*l*). Where three parish churches had been united by 22 Car. 2, c. 11, it was held that the benefice may be described, in pleading, as one rectory (*m*).

Church united to a Prebend.

If a church parochial be united to a prebend in a cathedral church, and a clerk is collated to the prebend, and after installed in the cathedral, although that the parish church be not in the same diocese with the cathedral, yet the clerk thereby hath possession thereof, without any presentation, institution, or induction; because by the union the parish church is become the corps of the prebend (*n*).

Union how tried.

After a union is made, if any question doth arise concerning the validity thereof; this may not be tried in the temporal, but only in the spiritual court: unless it be such union as is restrained by the aforesaid statutes (*o*).

University—See Colleges.

Voidance—See Avoidance.

(*h*) Gibs. 920; Wats. c. 16.

(*i*) Gibs. 921.

(*k*) Gibs. 917.

(*l*) Cro. Eliz. 720; Gibs. 920.

(*m*) *Wilson q. t. v. Van Hildart*,
2 B. & P. 394.

(*n*) Wats. c. 16.

(*o*) Ibid.

Usurpation (*p*).

WHEN a stranger that hath no right presenteth to a church, and his clerk is admitted and instituted, he is said to be an usurper, and the wrongful act that he hath done is called an usurpation. This is the definition given by Lord Coke; and with regard to the first step towards an usurpation which he there mentions, viz. presenting, it is to be observed, that a presentation made by a stranger, if it be void in law (as in the case of simony, or of a presentation to a donative, or to a church that is full), makes no usurpation against the rightful patron; as neither doth a presentation, where between the usurper and the person upon whom the usurpation is made there is privity in blood, as in the case of coparceners; or privity in the estate, as between lessor and lessee, grantor and grantee, joint-tenants, and tenants in common. In none of these cases is the act of presenting the foundation or commencement of what the law calls an usurpation. And as to the second step mentioned in the aforesaid definition (viz. being admitted and instituted), it must be an admission upon a presentation made; and by consequence not a collation by the bishop; nor the institution of a clerk who, pretending himself to be patron of a church that is void, prays the ordinary to admit and institute him, and (without a presentation in form) obtains institution (*q*).

Also it is said that no usurpation in time of war putteth the right patron out of possession, albeit the incumbent come in by institution and induction; and time of war doth not only give privilege to them that be in war, but to all others within the kingdom; and although the admission and institution be in time of peace, yet if the presentment were in time of war, it putteth not the right patron out of possession (*r*).

And the reason of this seemeth to have been because anciently in the time of war the courts were shut up, so that the true patron might not have an opportunity to bring his *quare impedit* within the six months.

For to complete an usurpation, the usurper must be in peaceable possession for six months. At the common law, if a stranger had presented his clerk, and he had been admitted and instituted to a church, whereof any subject had been lawful patron; the patron had no other remedy to recover his advowson but a writ of right of advowson, wherein the incumbent was not to be removed: and the reason of this was,—1. To the intent that the incumbent might quietly intend and apply himself to his spiritual charge: and 2. The law intended that the bishop, that had the cure of souls within his diocese, would admit and institute an able man for the discharge of the

(*p*) [See title **Advowson**, vol. i.]

(*q*) *Gibs.* 782.

(*r*) 1 *Inst.* 249; *Wats. c.* 20.

pastoral duty, and that the bishop would do right to every patron within his diocese. But since the statute of the 13 Edw. 1, st. 1, c. 5, to enable the usurper to plead plenarty against the true patron, so as to debar him absolutely of that turn, it is not enough that the usurper do present duly, and his presentee be admitted, instituted and inducted, but also that the church hath been full by the space of six months, and no writ brought to recover the presentation: for within the six months the patron may bring his writ of *quare impedit* or *darrein presentment* (as the case requires), and recover his presentment and possession of the advowson; but if neither of these writs be brought within the six months (that is, so as to bear teste within that time) the incumbent is in for life, and the usurpation complete (*s*).

And heretofore, if an usurper presented, and the clerk was instituted and inducted, and the true patron did not bring his *quare impedit* within six months, in some cases he did not only lose his turn for that time, but his presentation was gone for ever (*t*).

Thus in the case of *Ashby v. White*, T., 2 Ann., it was said by Holt, chief justice, that if the purchaser of an advowson in fee simple, before any presentment, suffer an usurpation, and six months to pass without bringing his *quare impedit*, he hath lost his right to the advowson, because he hath lost his *quare impedit*, which was his only remedy; for he could not maintain a writ of right of advowson: and though he afterwards usurp, and die, and the advowson descend to his heir, yet the heir cannot be remitted, but the advowson is lost for ever without recovery. For where a man hath but one remedy to come at his right, if he loses that, his right is gone (*u*).

But now by the statute of the 7 Ann. c. 18, "Forasmuch as the pleading in a *quare impedit* is found very difficult, whereby many patrons are either defeated of their rights of presentation, or put to great charge and trouble to recover their right; it is therefore enacted, that no usurpation upon any avoidance in any church, vicarage, or other ecclesiastical promotion, shall displace the estate or interest of any person entitled to the advowson or patronage thereof, or turn it to a right; but he that would have had a right if no usurpation had been, may present or maintain his *quare impedit* upon the next or any other avoidance (if disturbed) notwithstanding such usurpation."

[In the *Attorney-General v. Bishop of Litchfield*, this act was held not to be retrospective (*x*).—ED.]

(*s*) 1 Inst. 344; Wats. c. 13.

(*t*) Wats. c. 7.

(*u*) Lord Raym. 954.

(*x*) [5 Ves. 828.]

Wakes—See Church.**[Wales.**

[**DISTRIBUTION** of intestates' effects there, see title **Wills**, p. 602, in this volume.

[No tithe of marriage goods shall be paid in Wales, 2 & 3 Edw. 6, c. 13, s. 16. See title **Tithes**. Tithes in Wales.

[Before the statute of 27 Hen. 8, c. 26, reduced all the lordships marchers of Wales, which were formerly in no county, to be part of either English or Welsh counties, *quare impedit* of churches, *within the lordships marchers*, were impleadable in the king's courts of England by originals out of the Chancery directed to the sheriffs of the adjoining English counties, and the issue was tried therein; but since that act, though the jurisdiction of those courts is absolute over such of the former lordships marchers as are annexed to *English* counties, there is none over the rest annexed to *Welsh* counties, and the same rule has prevailed as to actions for *lands* within or without the marches (a). Trial of right to Advowsons or Benefices in Wales.

[In the argument in *Lampley and another v. Thomas and another* (b), it is said, Writs of *quare impedit* have often been brought of churches in Wales in the king's courts *here*; but that was either because the dispute was between the lords marchers, or between the Welsh bishops and others, (the former of whom would obey no man *in Wales* (c)), and because the *princes of Wales* could not direct a writ to a bishop in Wales, on a *quare impedit* there brought, for he would not obey it (d). It is evident that the *stewards of the courts of lordships marchers* could not direct such a writ to those bishops (e). But it appears that the king or his justices in Wales might do so; for when the dominion of Wales was lawfully vested in the king of England, his justices there must have the same power as to the bishops that the justices of the courts of the princes of Wales (who originally founded the Welsh bishoprics) had before: and it seems, that *quare impedit* of churches *within the principality* were frequent in Wales, and the bishops there served the writs directed to them (f).

[And now by 34 & 35 Hen. 8, c. 26. ss. 12, 13, and 18 Eliz.

(a) [See the cases collected in Vaugh. Rep. 411, 412—417.]

(b) [As reported in Wils. R. 197, citing Vaugh. 409.]

(c) [36 H. 6, f. 33, A. B. as cited Vaugh. R. 409, 410.]

(d) [11 H. 6, f. 3, A. B. cited Vaugh. R. 409.]

(e) [Vaugh. R. 410, 411.]

(f) [10 H. 4, f. 6; 11 H. 6, f. 3, cited Vaugh. R. 411, 412.]

c. 8, s. 4, the justices of Wales are empowered to take cognisance of *quare impedit*, and of all actions *real*, with all powers of the Court of Common Pleas in England relating thereto.

[Again, by 34 & 35 Hen. 8, c. 26, s. 32, all actions *real* and *quare impedit*, shall be sued by original writs, sealed with the original seals of the courts of great session, returnable before the Welsh justices at those sessions; but this does not seem to exclude a concurrent jurisdiction of the courts at Westminster (g).

Service in
Churches in
Wales.

[By 13 & 14 Car. 2, c. 4, s. 27, the bishops of Hereford, St. David's, St. Asaph, Bangor, and Llandaff, and their successors, shall take order that the said book be translated into the British or Welsh tongue, to be used in Wales where the Welsh tongue is commonly to be used: and at the same time, an English book shall be had there likewise, that such as understand the same may have recourse thereunto; and such as do not understand the same may, by comparing both tongues together, the sooner attain to the knowledge of the English tongue.

[By sect. 26, a penalty of 3*l.* per month was imposed on every parish or chapelry, cathedral church, college or hall, for so long as after the feast of Bartholomew 1662 they shall be unprovided with a true printed copy of the said book.

[Want of knowledge in the Welsh tongue was a good cause of refusal where the service was to be performed in that language, as rendering the clerk incapable of the cure; nor did it avail to allege that the language might be learned, or that the part of the cure he was incapable of might be discharged by a curate (h).

[The Act of Uniformity, 13 & 14 Car. 2, s. 27, enacts,

Proviso for
the Bishops
of Hereford,
St. David's,
Asaph, Ban-
gor, Llandaff.

["That the bishops of Hereford, St. David's, Asaph, Bangor and Llandaff, and their successors, shall take such order among themselves, for the souls' health of the flocks committed to their charge within Wales, that the book hereunto annexed be truly and exactly translated into the British or Welsh tongue; and that the same so translated, and being by them, or any three of them at the least, viewed, perused and allowed, be imprinted to such number at least, so that one of the said books so translated and imprinted, may be had for every cathedral, collegiate and parish church, and chapel of ease, in the said respective dioceses and places in Wales, where the Welsh is commonly spoken or used, before the first day of May one thousand six hundred and sixty-five; and that from and after the imprinting and publishing of the said book so translated, the whole divine service shall be used and said by the ministers and curates throughout all Wales within the said dioceses where the Welsh tongue is commonly used, in the British or Welsh tongue,

(g) [See *The King v. Morris*, 1 Mod. 64, 68; *The King v. Atholl*, Stra. 553.] (h) [*Albany v. Bishop of St. Asaph*, Cro. Eliz. 119.]

in such manner and form as is prescribed according to the book hereunto annexed to be used in the English tongue, differing nothing in any order or form from the said English book; for which book, so translated and imprinted, the churchwardens of every the said parishes shall pay out of the parish money in their hands for the use of the respective churches, and be allowed the same on their account; and that the said bishops and their successors, or any three of them at the least, shall set and appoint the price for which the said book shall be sold: and one other book of common prayer in the English tongue shall be bought and had in every church throughout Wales, in which the Book of Common Prayer in Welsh is to be had by force of this act, before the first day of May one-thousand six-hundred sixty and four, and the same books to remain in such convenient places within the said churches, that such as understand them may resort at all convenient times to read and peruse the same, and also such as do not understand the said language, may, by conferring both tongues together, the sooner attain to the knowledge of the English tongue; any thing in this act to the contrary notwithstanding: and until printed copies of the said book so to be translated may be had and provided, the form of common prayer established by parliament before the making of this act, shall be used as formerly in such parts of Wales where the English tongue is not commonly understood."

[By sect. 11 of 6 & 7 Will. 4, c. 77, it is enacted, that the church commissioners should lay before her Majesty in council a scheme for the preventing the appointment of clergymen in Wales not acquainted with the Welsh language; this was repealed and a more general enactment substituted by 1 & 2 Vict. c. 106:

[Sect. 103. "And whereas in many benefices in Wales and in the counties adjacent thereunto many of the inhabitants are imperfectly or not at all instructed in the English language, and it is expedient that persons to be hereafter instituted or licensed to such benefices should possess an adequate knowledge of the Welsh language; and whereas in and by an act passed in the session of parliament holden in the sixth and seventh years of his late majesty's reign, intituled 'An Act for carrying into effect the Reports of the Commissioners appointed to consider the State of the Established Church in England and Wales, with reference to Ecclesiastical Duties and Revenues, so far as they relate to Episcopal Dioceses, Revenues and Patronage,' the said commissioners were directed to prepare and lay before his then majesty in council a scheme for preventing the appointment of any clergyman not fully conversant with the Welsh language to certain benefices with cure of souls in Wales; and whereas it is expedient to repeal such enactment, and instead thereof to enact other provisions of more general and extensive application:' be it therefore enacted, that the said enactment shall be and the same is hereby repealed."

Repeal of
part of 6 & 7
Will. 4, c. 77.

[Sect. 104. "That within the several dioceses of Saint Asaph, Bangor, Llandaff, and Saint David's, it shall and may be lawful for the bishop, if he shall think fit, to refuse institution or licence to any spiritual person who after due examination and inquiry shall be found unable to preach, administer the sacraments, perform

Provision for
Benefices in
certain Welsh
Dioceses.

other pastoral duties, and converse in the Welsh language; provided always, that any such spiritual person may, within one month after such refusal, appeal to the Archbishop of Canterbury, who shall either confirm such refusal or direct the bishop to grant institution or licence, as shall seem to the said archbishop just and proper: provided also, that nothing hereinbefore contained shall be construed to affect or abridge any rights which the inhabitants of any benefice within the said four Welsh dioceses may at present by law possess of entering a caveat against or objecting in due course of law to the institution, collation, or licence of any spiritual person, or of proceeding to procure the deprivation of any such person."

Provision for
Curates in
certain Welsh
Dioceses.

[Sect. 105. "That all the provisions and powers of this act relating to the appointment of curates where the ecclesiastical duties are inadequately performed shall within the several dioceses of Saint Asaph, Bangor, Llandaff, and Saint David's extend and apply to cases wherein the bishop shall see reason to believe that the ecclesiastical duties of any benefice are not satisfactorily performed by reason of the insufficient instruction in the Welsh language of the spiritual person serving such benefice."

[See also the title **Benefice**, vol. i. p. 156, and for provisions relating to marriages, see title **Marriage**, vol. ii. p. 433 *qq.*—ED.]

Waste committed in the Glebe Lands—See **Glebe Lands**.

Way through the Churchyard—See **Church**.

Way to the Church—See **Church**.

Weapon drawn in the Church or Churchyard—
See **Church**.

Welsh Tongue, Service in it—See **Public Worship**.

Whitsun=farthings—See **Pentecostals**.

Wills.

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I. *Who may make a Will* [before Jan. 1, 1838.]

TESTAMENT and *will*, strictly speaking, are not synonymous. A will is property limited to land; and a *testament* only to chattels, requiring executors, which a will only for land doth not require. So every testament is a will, but every will is not a testament (*i*).

Difference
between
Wills and
Testaments.

But as authors in treating upon this subject have not adhered to this distinction, so throughout this title the words *will* and *testament* are used indiscriminately.

So also the word *devise* seemeth properly applicable to lands; *bequest*, *bequeath*, *give*, *dispose*, and such like, to goods; yet, forasmuch as authors do generally confound them, and because that propriety of expression is not so much regarded in wills as in other legal instruments of conveyance, so long as the testator's intention doth sufficiently appear, therefore it hath not been thought necessary in these different ways of expression to observe a scrupulous exactness, but to take the words in the several authors as they stand, and this so much the rather, as it seemeth in general to be an unwarrantable liberty, in reciting matters of law from books of acknowledged authority, to presume to vary the expression without necessary or urgent cause.

[No will made after the 1st January, 1838, by a person under the age of twenty-one years, is valid.—ED.]

It doth not seem to be clearly settled what shall be the lowest age at which a person shall be allowed to make a testament of goods and chattels. Infant.

Dr. Gibson says, when prohibitions have been prayed, on suggestion that the testator was not in one case seventeen, in another case eighteen years of age, which it was said were the

(*i*) God. Orph. Leg. 4, 5.

lowest ages assigned by the common law for making a testament of goods and chattels; they were denied in both cases for the same reason, namely, that it belongs to the ecclesiastical court to judge when a person is of age to make a will; and if an inferior court had given sentence against their own law, there was no remedy but by appeal (*k*).

And one reason of limiting the same to the age of seventeen may be, because (as it is agreed on all hands) that is the proper age at which a person is allowed to take upon himself the office of an executor; administration during the minority of an infant executor ceasing at that age.

In the case of *Bishop v. Sharp*, M., 1704 (*l*), in the Court of Chancery, it is said to have been agreed, that a female may make a will at twelve years; and a male at seventeen, or at fifteen, if proved to be a person of discretion.

Dr. Godolphin says, an infant male at the age of fourteen years, and female at the age of twelve years, may make a testament of goods and chattels (*m*).

And in the case of *Hyde v. Hyde*, H., 8 Anne (*n*), it is said to have been agreed, that a male infant of fourteen years of age and a female of twelve years of age, might make a will of a personal estate; and it was said in this case, that it was so agreed by the lord keeper, Wright, in the case of *Sharpe v. Sharpe*, wherein they followed the civil law of Justinian for their consent to marry at such ages.

[So in the case of *Arnold v. Earle* (*o*), the Prerogative Court of Canterbury established the will of a schoolboy sixteen years old, no evidence of undue influence or control being shown.—ED.]

And it is true that Justinian fixes the *testamentary* age and the age of *puberty* alike, to wit, in the male at the age of fourteen; and in the female at the age of twelve. But by the common law of England, the age of *discretion* both in the male and female is the age of fourteen, although the same common law admits of Justinian's distinction as to the age of *puberty* or consent to marriage.

And by the author of the *Law of Executors*, who is said to have been Judge Doddridge, it seems to be laid down generally, that an infant of the age of discretion, to wit, the age of fourteen years, may make a will of goods and chattels (*p*).

And Mr. Wentworth saith (*q*), he thinks that at the age of

(*k*) Gibs. 461; [*Smallwood v. Brickhouse*, 2 Mod. 315; S.C. Show. 204; T. Jones, 210. See *Chancellor of Lichfield and Dalby v. Smith*, Comperb. 50.]

(*l*) 2 Vern. 469.

(*m*) God. O. L. 23.

(*n*) Gilb. Rep. 74.

(*o*) [2 Lee's Rep. 529; and also the cases of *Ames v. Ward*, before Sir G. Hay (1767), cited by Dr. Swabey in *Walker, &c. v. Heseltine, &c.* 1 Phill. 159.—ED.]

(*p*) Law of Ex. 10.

(*q*) Wentw. 214.

fourteen, being in the judgment of law the age of discretion, a person may make a testament.

Finally, Sir William Blackstone says (*r*), infants under the age of fourteen if males, and twelve if females, cannot make a testament; which is the rule of the civil law. For though some of our common lawyers have held that an infant of any age (even four years old) might make a testament, and others have denied that under eighteen he is capable; yet, as the ecclesiastical court is the judge of every testator's capacity, this case must be governed by the rules of the ecclesiastical law.

Note, it is Mr. Perkins (*s*), whom all the subsequent authors quote with some degree of wonder for asserting that an infant of four years of age may make a testament. But surely this must have been an error of the press, which might possibly enough happen from a similitude of the words, or especially of the figures 4 and 14.

[When a male infant has attained the age of fourteen or a female of twelve, it may make a will without or against the consent of its father, tutor, or guardian (*t*), and if it be made on the last day of the fourteenth or twelfth year, it is as valid as if such day had already expired (*u*); or if after the attainment of those ages, the infant approve of a will made before, such will is made valid (*x*). But there must be a republication; the mere fact that an infant has lived some time after attaining the age of capacity will not render valid a will made during his incapacity (*y*).—ED.]

But by the statute of the 34 & 35 Hen. 8, c. 5, s. 14, wills or testaments made of any manors, lands, tenements, or other hereditaments, by any person within the age of twenty-one years, shall not be taken to be good or effectual in law; for until that time, by the common laws of this realm, they are accounted infants (*z*).

But by custom, in particular places, they may devise lands before the age of twenty-one (*a*).

But no custom of any place can be good to enable a male infant to make a will before he is fourteen years of age (*b*).

An idiot is justly excluded from making a testament (*c*).

Idiot.

[Whether a person be idiot or not must be decided by the particular circumstances of each case.—ED.]

But generally, an idiot, or natural fool, is he, who notwithstanding he be of lawful age, yet he is so witless, that he cannot

(*r*) 2 Black. 497.

(*s*) Perk. s. 503.

(*t*) [Swinburne, part 2, s. 2, pl. 6; Bac. Abr. "Wills."]

(*u*) [Swinburne, part 2, s. 2, pl. 7; Herbert v. Torball, Sid. 162; Bac. Abr. "Wills," 6, 2.]

(*x*) [Ibid.]

(*y*) [Herbert v. Torball, Sid. 162.]

(*z*) [Swin. part 2, s. 2, note (f); Co. Litt. 89, note (b) by Mr. Hargrave.]

(*a*) God. O. L. 21; Wentw. 214.

(*b*) Law of Exec. 153; Jermyn v. Arstete, 2 And. 12; Godolphin, part 1, c. 8, s. 1; Com. Dig. "Devise," H. 2.

(*c*) Swin. 8.

number to twenty, nor can tell what age he is of, nor know the who is his father or mother, nor is able to answer any such easy question; whereby it may plainly appear that he hath not reason to discern what is to his profit or damage, nor is apt to be informed or instructed by any other; and such an idiot cannot make any testament, nor may dispose either of his lands or goods (*d*). [However wisely an idiot's will be made, it is void in law (*e*).—ED.]

Lunatic.

Mad folks and lunatic persons, during the time of their furor or insanity of mind, cannot make a testament nor dispose any thing by will, and the reason is most forcible, because they know not what they do; for in making of testaments, the integrity and perfectness of mind and not health of the body is requisite (*f*).

[But if a person of sound mind make his will, and afterwards become insane, such subsequent disability does not annul such will (*g*). The court of equity has ordered the will of a testator subsequently found to be a lunatic, to be committed to the custody of the master (*h*).—ED.]

Howbeit, if these mad or lunatic persons have clear or calm intermissions, then during the time of such their quietness and freedom of mind, they may make their testaments (*i*).

And it is sufficient for the party which pleadeth the insanity of the testator's mind, to prove that the testator was beside himself before the making of the testament, although he do not prove the testator's madness at the very time of making the testament; the reason is, it being proved that the testator was once mad, the law presumeth him to continue still in that case, unless the contrary be proved. For like as the law presumeth every man to be an honest man, unless the contrary be proved, and being proved, then he which is evil to be evil still; so concerning furor, the law presumeth every man to have the use of reason and understanding, unless the contrary be proved; which being proved accordingly, then he is presumed in law to continue still void of the use of reason and understanding, unless the testator were beside himself but for a short time, and in some peculiar actions, and not continually for a long space, as for a month or more; or unless the testator fell into some frenzy upon some accidental cause, which cause is afterwards taken away: or unless it be a long time since the testator was assaulted with the malady; for in these cases the testator is not presumed to continue in his former furor or frenzy (*k*).

Yet it is a hard and difficult point to prove a man not to have

(*d*) Swin. 79.

(*e*) [1 Hale, P. C. 29; Bac. Abr. "Wills," b. 12.]

(*f*) Swin. 76; [*Beverley's case*, 4 Co. 124—6; God. part 2, c. 8, s. 2.]

(*g*) [Swin. part 2, s. 2, pl. 3; *Forse*

and *Hembling's case*, 4 Co. 61—6.]

(*h*) [*In re Thompson*, 1 Russ. & M. 355.]

(*i*) Swin. 76.

(*k*) Swin. 78.

the use of understanding or reason, and therefore it is not sufficient for the witnesses to depose that the testator was mad or beside his wits, unless they render or yield a sufficient reason to prove this their deposition, as that they did see him do such things, or heard him speak such words, as a man having reason would not have done or spoken (l).

Lunatic.

Questions upon the general sanity of testators, or the prevalence of a lucid interval at the time of executing their will, occur frequently both in the civil and ecclesiastical courts. They are usually determined on the particular circumstances of each individual case; for according to Lord Thurlow's opinion in *Attorney-General v. Parnter* (m), "it seems scarcely possible to extract from any particular case of this kind that which will apply to any other." But, his lordship adds, "it is of equal importance that the evidence in support of the allegation of a lucid interval, after derangement at any period has been established, should be as strong and as demonstrative of such fact, as where the object of the proof is to establish derangement." Indeed if lunacy be once established, it is a matter of nice investigation to say, what shall be evidence of such a remission or intermission of the disorder, as shall allow the lunatic to dispose of his property by will. The points generally insisted upon in proof and argument, relate to the state of the testator before making the will, the will itself, and his subsequent conduct. And if the circumstances of the case, among which may be reckoned the nature of the disorder, afford any reasonable ground to suppose that a lucid interval may have prevailed, it will be difficult to set aside the will, if it be rationally drawn up both with regard to the disposition of the property and the aptness of the expression to effectuate the testator's intention, especially if it be written entirely by himself; for these circumstances seem to establish that sound disposing mind and memory which the law requires.

[“If general lunacy is established (said Sir W. Grant) they will be under the necessity of showing, according to the *Attorney-General v. Parnter*, that there was not merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind sufficient to enable the party soundly to judge of the act (n).”—ED.]

In the case of *Cartwright v. Cartwright* (1795) (o), before the Delegates in appeal from the Prerogative Court of the Archbishop of Canterbury, it appeared that the testatrix was insane from 1774 to 1794, when she died, and though decent in her appearance always answered to any inquiries about her

(l) Swin. 78.

(m) [3 Bro. C. C. 443.]

(n) [Hall v. Warren, 9 Ves. 611. In *Ex parte Holyland*, 11 Ves. 11, Lord Eldon seems to have misunder-

stood the expressions of Lord Thurlow in the *Attorney-General v. Parnter*. See Williams on the Law of Exec. & Ad. p. 19.—ED.]

(o) [1 Phill. 100.]

health, *that she was dying, for that all her bones were broken.* She had made a former will, and had been heard to lament that she had destroyed it, adding that she had lost her senses. In November, 1794, she repeatedly called for pen, ink, and paper, with which she was at last indulged, the doctor who attended her saying that she must be pacified by compliance, but that nothing she could write would be valid. Her hands being loosed from a strait waistcoat, she walked about in a great agitation, wrote on several pieces of paper which she afterwards tore, and at last produced a most perfect and well written will, in which she preferred *nieces, the descendants of a sister of the whole blood, to sisters of the half blood*; being asked if a witness was necessary to authenticate the will, she answered no, for that her will was only of personal property; and sealing it, she delivered it to a friend, and was heard afterwards to express satisfaction at what she had done. She soon after relapsed into her disorder, in which she continued to her death. And the Delegates affirmed the judgment of Sir W. Wynne, the judge of the Prerogative Court, establishing the will.

[This eminent judge cited the following passage from Swinburne (*p*), since often quoted: “If a lunatic person, or one that is beside himself at some times but not continually, make his testament, and it is not known whether the same were made while he was of sound mind and memory or no, then, in case the testament be so conceived as thereby no argument of phrensy or folly can be gathered, it is to be presumed that the same was made during the time of his calm and clear intermissions, and so the testament shall be adjudged good, yea although it cannot be proved that the testator useth to have any clear and quiet intermissions at all, yet nevertheless I suppose that if the testament be wisely and orderly framed the same ought to be accepted for a lawful testament.”—ED.]

But if other circumstances in proof, added to the nature of the bequests, should raise a presumption that the will originated in insanity, an aptness of expression will not alone suffice to establish it. Thus in the case of *Clark v. Lear and Scarwell* (*q*), in the ecclesiastical courts, in March, 1791, the testator, a middle-aged man, being a lunatic, escaped from his keeper, and at a watering place fell in love with a young lady, to whom he afterwards sent in very polite terms a present of a lottery ticket, and making a will, rational on the face of it, left her a legacy of 1000*l*. But though it was argued that all this had the appearance of reason, the will was set aside as being bottomed in insanity (*r*).

(*p*) [Pt. 2, s. 3, pl. 4.]

(*q*) [Cited in 1 Phill. 100.]

(*r*) [See also Sir John Nicholl's remarks in *Evans v. Knight*, 1 Add. 237, 238; and on the subject of lucid

intervals at the time of making a will, *The Attorney-General v. Parnther*, 3 Bro. C. C. 441 (cited above); *Coghlan v. Coghlan*, 1 Phill. 120; *Williams v. Goudes, &c.* 1 Hagg. 577. The

[“There is a partial insanity of mind and a total insanity. The former is either in respect to things *quoad huc vel illud insanire*. Some persons that have a competent use of reason in respect of some subjects, are yet under a particular *dementia* in respect of some particular discourses, subjects, or applications; or else it is partial in respect of degrees. And this is the condition of very many, especially melancholy persons, who for the most part discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason; and this partial insanity seems not to excuse them in the committing of any offence for its matter capital: for doubtless most persons that are felons of themselves, and others, are under a degree of partial insanity when they commit these offences. It is very difficult to define the invisible line that divides perfect and partial insanity; but it must rest upon circumstances duly to be weighed and considered both by judge and jury, lest on the one side there be a kind of inhumanity towards the defects of human nature, or on the other side too great an indulgence given to great crimes.” These are the memorable words of Lord Hale, quoted by Sir John Nicholl in his judgment in the celebrated case of *Dew v. Clark*, which was confirmed by the judge’s delegate, and which has established the doctrine, that *partial insanity* will invalidate a will which can fairly be inferred to be the *direct offspring* of that partial insanity (*s*). But in the case of a person sometimes sane and sometimes insane, the Prerogative Court will not at once reject an allegation propounding a will which “sounds to folly,” when facts are pleaded showing that the deceased, up to the time of his death, conducted himself in the ordinary concerns of life as a sane man (*t*). In *Le Breton v. Fletcher* (*u*), a will was pronounced for though both the attesting witnesses deposed to the testator’s incapacity.—ED.]

Partial Insanity.

E., 3 Jac. 1, in the Star Chamber, in *Combe’s case* (*x*) it was agreed by the judges, that sane memory for the making of a will is not at all times when the party can speak yea or no, or had life in him, nor when he can answer to any thing with sense; but he ought to have judgment to discern, and to be of perfect memory, otherwise the will is void.

Persons of a weak Understanding.

distinction between delirium or temporary madness, and permanent insanity, is pointed out by Sir J. Nicholl in *Brogden v. Brown*, 2 Add. 445.—ED.]

(*s*) [1 Add. 279; 3 Add. 79. In this judgment the *criteria* of insanity are laid down with much precision and accuracy. A commission of review was refused by the Lord Chancellor (Lyndhurst) in this case. See his remarks, 5 Russ. Chan. Cas. 166, 167. See also Lord Erskine’s speech

on the trial of Hadfield; *Greenwood’s case*, as commented on by Sir J. Nicholl, 3 Add. 96; and by Lord Eldon in *White v. Wilson*, 13 Ves. 89. See, too, *Lowe v. Jolliffe*, 1 W. Bl. 365; *Fuller v. Atkinson*, 3 Hagg. 527; *Arbery v. Ashe*, 1 Hagg. 214; *Le Breton v. Fletcher*, 2 Hagg. 558.—ED.]

(*t*) [*Arbery v. Ashe*, 1 Hagg. 214.]

(*u*) [2 Hagg. 558. See also *Lowe v. Jolliffe*, 1 W. Bl. 365.]

(*x*) Moor, 759.

[A man may not be of a sound and *disposing* mind, although he be not absolutely insane, and a fit object for a commission of lunacy (*y*). The rules by which the competency of a disposing mind can be ascertained are laid down in *Marsh v. Tyrrell*, and *Ingram v. Wyatt*, by Sir John Nicholl (*z*).—ED.]

And in the case of the *Marquis of Winchester*, T., 41 Eliz. (*a*), it is said, that by the law it is not sufficient that the testator be of memory when he maketh his will, to answer to familiar and usual questions; but he ought to have a disposing memory, so that he be able to make disposition of his estate with understanding and reason: and this is such memory as the law calls sound and perfect memory.

It is not sufficient that the testator be corporally present when he signs his will, if in truth he be absent as to mental purposes (*b*).

But every person is presumed to be of perfect mind and memory, unless the contrary be proved; and therefore if any person go about to impugn or overthrow the testament, by reason of insanity of mind, or want of memory, he must prove that impediment (*c*).

But if a man be of a mean understanding, neither of the wise sort nor of the foolish, but indifferent, as it were betwixt a wise man and a fool, yea, though he rather incline to the foolish sort; such an one is not prohibited to make a testament: unless he be yet more foolish, and so very simple and sottish, that he may easily be made to believe things incredible or impossible, and hath not so much wit as a child may have of ten or eleven years of age, who is therefore intestable by the law, for want of judgment (*d*).

Person in
Liquor.

He that is overcome with drink, during the time of his drunkenness, is compared to a madman; and therefore if he make his testament at that time, it is void in law. Which is to be understood, when he is so excessively drunk, that he is utterly deprived of the use of reason and understanding; otherwise if he be not clean spent, albeit his understanding be obscured, and his memory troubled, yet he may make his testament being in that case (*e*). [This is the last class of *non compotes* mentioned by Lord Coke.

[Intoxication is considered by testamentary courts as a temporary insanity, which ceases with the exciting cause (*f*), and

(*y*) [Per Lord Chief Baron Eyre, in *Mountain v. Bennett*, 1 Cox, 356; and as to idiots, see Swinburne, pt. 2, s. 4, pl. 2; *Beverley's case*, 4 Co. 1246; Bac. Ab. Idiots.]

(*z*) [2 Hagg. 122; 1 Hagg. 401. See also *Herbert v. Lowins*, 1 Chan. Rep. 24; *Dyer*, 72 a, in marg.; *Ball v. Mannin*, 3 Bligh's N. S. 374.]

(*a*) 6 Co. 23.

(*b*) *Right v. Price*, 1 Doug. Rep. 241.

(*c*) Swin. 77.

(*d*) Swin. 80.

(*e*) Swin. pt. 2, s. 6.

(*f*) [*Wheeler and Batsford v. Alderson*, 3 Hagg. 602.]

where no fixed and settled delusion is shown, and consequently no decided actual insanity and extravagant acts are accounted for by the excitement of liquor, while at times the mind was sound; in order to avoid a will, it must be proved that the deceased was so excited by liquor, or so conducted himself during *the particular act*, as to be *at that moment* legally disqualified from giving effect to such an act (*g*); for insanity, it has been remarked, may be *latent*, but there can be no such thing as *latent ebriety* (*h*).

[The 1 Vict. c. 26 (see sect. 8), does not affect the law as to the wills of married women.—ED.] Married Women.

By a constitution of Archbishop Stratford: “Whereas divers persons do hinder or endeavour to hinder the free making and execution of the testaments of women, either sole or married; we decree, that none shall henceforth do the same on pain of the greater excommunication (*i*).”

And Lindwood (*h*), in his commentary hereupon, contends for the capacity of married women to make a will, in pursuance of this constitution; especially where such woman hath brought a large fortune to her husband, who perhaps had nothing of his own before.

[The civil law made no distinction in the case of a married woman as to the power of making a will.—ED.]

Two years after the making of this constitution, we find a petition of the commons in parliament, that whereas there was a constitution made by the prelates, that women married (*niefs and femes*) might make a will, it might be ordained that the people should remain in the same state as they had been accustomed to be in the times of the king's progenitors: to which it is answered as to this matter, that the king wills that law and reason be done (*l*).

And by the statute of the 34 & 35 Hen. 8, c. 5, s. 14, “it is enacted, that “wills or testaments made of any manors, lands, tenements or other hereditaments, by any woman covert, shall not be taken to be good or effectual in the law.”

But nevertheless, a *feme covert* may have a power given her by settlement, so to dispose of land by writing in the nature of a will, as to prevent its going to the heir, namely:—1. By vesting the legal estate in trustees, and giving her a power to

(*g*) [*Wheeler and Batsford v. Alderson*, 3 Hagg. 602.]

(*h*) [*Ayrey v. Hill*, 2 Add. 206; *Billinghurst v. Vickers*, 1 Phill. 191. See also *Rex v. Wright*, where a rule was obtained to show cause why a criminal information should not be obtained against persons for endeavouring to procure a will from a woman immoderately addicted to liquor. See *Cooke v. Clayworth*, 18 Ves. 12;

Butler v. Mulvihill, 1 Bligh, 137; *Say v. Barwick*, 1 Ves. & B. 195; *Pitt v. Smith*, 3 Campb. 33; *Macdiarmid v. Macdiarmid*, 3 Bligh's N. S. 374, for analogous cases of deeds obtained from intoxicated persons.—ED.]

(*i*) Lind. 173.

(*k*) Ibid.

(*l*) Gibs. 461; Rot. Parl. 18 Edw. 3, 12.

Married Women.

appoint the uses ; 2. By agreement, which, according to some authorities, a court of equity will compel the heir to execute by a proper conveyance (*m*). Although others seem to doubt whether such an agreement, while resting in agreement, though it bind the husband, can defeat the right of the heir at law (*n*).

And also of goods and chattels, the wife cannot make her testament without the licence or consent of her husband, because by the laws and customs of this realm, so soon as a man and woman are married, all the goods and chattels personal that the wife had at the time of the spousals or celebration of the marriage or after, and also the chattels real, if he overlive his wife, belong to the husband by reason of the said marriage, and therefore with good reason she cannot give that away which was hers without the sufferance or grant of the owner (*o*).

And albeit the testament be made before the marriage, yet she being intestable at the time of her death, by reason her husband is then living, the testament is void ; for it is necessary to the validity of such testament, that the testator have ability to make a testament, not only at the time of making thereof, when the testament receiveth its essence and being, but also at the time of the testator's death, when the testament receiveth its strength and confirmation (*p*).

And albeit the wife do overlive the husband, yet the testament made during the marriage is not good, because she was intestable at the time of the will making ; but if the testament being made during the coverture, she do approve and confirm the same after the death of her husband, in this case the devise is good, by reason of her new consent or new declaration of her will, for then it is as it were a new will (*q*).

And although the will be made before marriage, and the wife survive the husband, yet it seemeth that the will shall not revive upon the husband's death. As in the case of Mrs. Lewis some years ago, before the delegates :—Mrs. Lewis, a widow, made a will ; soon after, she married again ; in some time her second husband died, and she again became a widow, without any children by either husband. The will which she made in her first widowhood remained, and being found after her death, the question was, whether it was a good will or not. The counsel for the will cited many authorities from the civil law, and showed, that among the Romans, if a man had made his will, and was afterwards taken captive, such will revived and became again in force, by the testator's repossessing his liberty. But it was observed, on the other hand, that marriage is a voluntary act, but captivity is the effect of compulsion. And the

(*m*) *Wright v. Lord Cadogan*, 6 Bro. P. C. 156 ; cited and agreed by Lord Kenyon, in *Doe v. Staple*, 2 T. Rep. 684.

(*n*) See *Peacock v. Monk*, 2 Ves.

191, and Lord Thurlow's opinion in *Hodsdon v. Lloyd*, 2 Bro. 534.

(*o*) Swin. 88, 89.

(*p*) Swin. 88.

(*q*) Ibid.

will was adjudged not to be good. And in the case of *Forse v. Hemblinge*, M., 30 & 31 Eliz. (r), it was said, that if a man of sane memory make his will, and afterwards becometh of non-sane memory, this is no countermand of the will, because this is done by the act of God. But marriage is the voluntary act of the party, and amounteth in law to a countermand of the will.

S. P. on the will of Catherine Calver, who, by marriage articles between her and Dr. Hibbins, had a power to dispose of her property by will *after marriage* subsequent to the articles, but a few hours *before the marriage* she made a will, which was held to be revoked by the marriage (s).

But yet nevertheless, upon the licence or consent of the husband, the wife may make her testament even of his goods (t). [He may assent to his wife's will, and such assent will entitle the wife's executors to claim such articles of her personal estate which would have been her husband's as administrator (u); but a general assent is not sufficient, it must be shown that he consented to the particular will (x).—ED.]

Wife may by consent of her Husband make a Will.

But albeit the husband do give licence to his wife to make a will of his goods, yet he may revoke the same, not only at the making of the will, but after her death, at the least (Swinburne says) before the will be proved (y).

Yet such his consent (Dr. Gibson says) shall be implied, until the contrary do appear: and if after her death he doth consent, he can never afterwards dissent: and if immediately upon the death of the wife, he discourses and deals with the executor whom she hath appointed, as executor, as in recommending to him a painter for escutcheons, a goldsmith for rings, or the like, this is a good assent, and makes it a good will; and though after such assent given, he do upon the sight of the will dislike it, and oppose the probate, or enter a caveat, such disagreement shall not hurt the will; and when there is an express agreement or consent that a wife may make a will, a little proof will be sufficient to make out the continuance of that consent after their death, but it is necessary to prove a *disagreement* made in a solemn and formal manner in express words, and not by implication (z). [And where the will is made according to an express agreement, it is said that a slight proof will avail to make out the continuance till death (a).—ED.]

But by Lord Hardwicke, in the case of *Henley v. Philips*,

(r) 4 Co. 60, 61.

(s) *Doe v. Staple*, 2 T. Rep. 684;
Hodsdon v. Lloyd, 2 Bro. 534.

(t) Swin. 89.

(u) [1 Roper on Husband and Wife, 170, 2nd ed.]

(x) [*Rex v. Retsworth*, 2 Stra. 891;

Henley v. Philips, 2 Atk. 49.]

(y) Swin. 89.

(z) Gibs. 461, 462; [Roper on Husband and Wife, 170, 2nd ed.]

(a) [*Forse and Hemblinge's case*, 4 Co. 60, 61, referred to above.]

July 17, 1740 (b).—Though a feme covert has power of disposing of a sum of money or any other thing, by a writing purporting to be a will; yet, after the wife's death, the proving it in the spiritual court will not give it the authority of a will, but it will still be considered as an instrument only, or an appointment of such sum or other thing in pursuance of the power; and before it is proved in the spiritual court as a testamentary conveyance, the husband ought to be examined there as to his consent, nor till then will it have the effect and operation of a will.

If a woman have a lease, an estate by extent, the next avoidance of a church, or other chattel real, these are not divested out of her into her husband by marriage, but in case she overlive him, they continue to her as before, no alienation or alteration having been made by the husband, who had power to dispose of them by gift in his lifetime, though not by his will; yet such a woman in her husband's lifetime cannot of or for these things, without her husband's assent, make an executor or will; but she dying before him, they would by the operation of law accrue to him (c).

Choses in
Action.

Another kind of goods, or rather interest, a woman may have, to wit, debts or things in action, which, as the former, are not divested out of her by marriage into her husband, nor yet can she thereof make an executor without her husband's assent, although they be one degree farther from the husband than the said chattels real; for that though the husband do overlive the wife, he shall not be entitled to them as to the former. But if the wife makes him executor of these, as she may, or if after her death, he takes out administration of her goods, then he is thereby entitled to them (d).

Pin-money.

But it is said, if a woman hath pin-money or a separate maintenance settled on her, and she by management or good housewifery saves money out of it, she may dispose of such money so saved by her, or of any jewels bought with it, by writing in nature of a will, if she die before her husband, and shall have it herself if she survive him, and the same shall not be liable to the husband's debts (e).

And in *Fettiplace v. Gorges* (f), Lord Thurlow, C., held, that a wife having personal property secured to her sole and separate use, took it with all the incidents of property, and might therefore dispose of it and its produce by will, without the consent of her husband.

[The principle of this decision was, that the wife having been permitted to take property as a *feme sole* should take

(b) 2 Atk. 49; [but see below, *Jenkin v. Whitehouse*.]

(c) Went. 198; Law of Test. 33.

(d) Went. 199; Law of Test. 33, 34.

(e) Swin. a. 95; Viner, Baron and Feme, R. a. 16.

(f) 3 Bro. C. C. 8; S. C., 1 Ves. jun. 46.

it, with all its incidents, amongst which is the *jus disponendi* (g) of property, whether in possession or reversion, whether given to trustees for the wife's separate use, or without their intervention at once to the wife (h).—ED.]

And although a feme covert is so entirely under the power of her husband, that she cannot make what in propriety of speech is a will, yet she may make what is called an *appointment*. And the usual way is, for the intended husband to enter into a bond before marriage in a penal sum, conditioned to permit his wife to make a will, and to dispose of money or legacies to such a value, and to pay what she shall appoint, not exceeding such a value; and in such case, if after the marriage, and during the coverture, she makes any writing purporting to be her will, and disposes legacies to the value agreed, though in strictness of law she cannot make a will without her husband, yet this is a good *appointment*, and the husband is bound by his bond to perform what is appointed (i).

Power of Appointment to the Feme covert.

And it is said (k), that the husband may bind himself by covenant or bond to permit his wife by will to dispose of legacies, and this will be such an appointment as the husband will be bound to perform (l); yet it doth not operate as a will, neither ought it to be proved in the spiritual court; for the property passeth from him to her legatee, and it is his gift: and therefore if the legatee dieth before the wife, such legacy is not lapsed; for this, in strictness, is only the execution of a trust, and the executor or administrator of such legatee shall be entitled.

[This opinion has long been overruled; and it is now undoubted law that a testamentary appointment of this description by a wife must obtain probate in the ecclesiastical court (m) before it can be made available either in law or equity. This court limits the probate to the property comprised within the power of appointment; and, although the former practice was otherwise, does not now require the husband's concurrence to

(g) [See 2 Roper on Husband and Wife, 182; *Ledyard v. Garland*, 1 Curt. 288; *Allen v. Bradshaw*, 1 Curt. 110—123; *In the goods of Munday, deceased*, 1 Curt. 590; *Braham v. Burchell*, 3 Add. 263; *Peacock v. Monk*, 2 Ves. sen. 191; *Rich v. Cockell*, 9 Ves. 369; *Wagstaffe v. Smith*, 9 Ves. 520; *Heatley v. Thomas*, 15 Ves. 596; *Dalbiac v. Dalbiac*, 16 Ves. 116; *Bullpin v. Clarke*, 17 Ves. 365; *Power v. Baily*, 1 Balls & Beaty, 49; *Greatly v. Noble*, 3 Madd. 94; *Stuart v. Lord Kirkwall*, *ibid.* 389; *Acton v. White*, 1 Sim. & Stu. 429; and some other cases on the same subject collected by Mr.

Vaughan Williams in his note to p. 4, vol. i. of Executors and Administrators.—ED.]

(h) [In this case the court of equity considers the husband as a trustee to the separate use of the wife; see the authorities collected in *Tappenden v. Walsh*, 1 Phill. 352; *Rolfe v. Budder*, Bunb. 187; *Parker v. Brooke*, 9 Ves. 583; see *Braham v. Burchell*, 3 Add. 263, cited above.—ED.]

(i) Swin. a. 94; 1 Vern. 244.

(k) 1 Mod. 211.

(l) *Marriot v. Kingsman*, Cro. Car. 219.

(m) [Sugden on Powers, chap. 3; 2 Roper, c. 19.]

Power of
Appointment
to the *Feme*
covert.

be specified before the admission of the instrument to probate (*n*), though it will inquire and decide in the first instance whether the power has been duly executed. In the recent case of *Allen v. Bradshaw* (*o*), the judge of the Prerogative Court of Canterbury (Sir H. Jenner) held, that a power given to a *feme covert* to dispose of personal property by will “*to be by her signed and published in the presence of and to be attested by two or more credible witnesses,*” was not duly exercised by a writing purporting to be her will, and to be signed, but omitting to state that it was published by her in the presence of two witnesses. The judge held that *extrinsic* evidence of the fact of publication was not admissible, observing, “it is undoubtedly true that this court is always anxious to carry the intentions of testators into effect so far as the law will permit; but then it must first ascertain that the alleged testator had a legal capacity to make his will, before it can inquire as to the intention with which the testamentary act was executed: it cannot grant probate of the will of a married woman, when that fact appears, without requiring the production of the instrument under which she has acquired a privilege to which she was not before entitled; and *when it is satisfied that she has the potestas testandi, the court must then see that she has complied with the requisite formalities.*”—ED.]

And in the case of *Jenkin v. Whitehouse*, M., 31 Geo. 2, by Lord Mansfield, C. J. In a cause of *Ross v. Ewer*, in chancery, July 5, 1744, there was a power to a *feme covert* to appoint by will. And the Lord Chancellor held clearly, though such will operates as an appointment, that it must be proved in the spiritual court; and he would not proceed till the will was so proved. He said it was not material for him in that case to consider of the precise form in which it was to be proved, whether by a strict probate, or by granting administration with the appointment in nature of a will annexed; and therefore that point was not entered into; but the fact that the paper was her will, in case she had power to make one, must be established by the ecclesiastical court; for such an appointment is in the nature of a will, and attended with all the consequences of a will. And as to the point that money disposed under the execution of a power by such a will should not lapse, this was fully considered and contradicted in the cause of *The Duke of Marlborough v. The Earl of Carlisle and others*, Nov. 26, 1750. The cases that have been cited in this cause show that administration may be granted, with the appointment annexed, which proves it to be testamentary;

(*n*) [*Tappenden v. Walsh*, 1 Phillim. 352; *Moss v. Brander*, *ibid.* 254; *Boxley v. Stubbington*, 1 Lee, 540; *Keller v. Bevoir*, *ibid.* 563; *Temple v. Walker*, 3 Phillim. 394. But the whole law on this point will be found in *Allen v. Bradshaw*, 1 Curt. 110, 121.]

(*o*) [1 Curt. 110, 121.]

for nothing can be annexed to an administration but a testamentary disposition, which is proved and established by the ecclesiastical court in that form (*p*). But if the question be, whether the wife had a power to make an appointment in the nature of a will, and thereby to deprive the husband of any benefit which by law would devolve upon him in consequence of her death, that is a question proper to be considered at law; and if she had no such power, this court will grant a prohibition (*q*).

Power of Appointment to the *Feme covert*.

If in the case where a *feme covert* cannot make a testament without the husband's licence, the husband grants a licence to the wife to make a testament of a certain portion of his goods, and the wife so licensed doth make one testament, and afterwards another, and perhaps a third or fourth, the licence shall be understood of the last testament, and not of the first (*r*).

H., 4 Geo. 2, *King v. Bettesworth* (*s*), mandamus to grant administration to John Cullom or Joan his wife: return, that by articles before marriage it was agreed that the wife should have power to make a will and dispose of her leasehold estate; that pursuant to this power she made a will, and her mother executrix, who has duly proved the same. To this return it was objected, that she might have things in action not covered by the deed, and the husband was in all events entitled to an administration to them. On the other hand, it was insisted that with the consent of the husband she might make a will; and here is his consent by being party to the deed. But by the court: A general consent to make a will doth not seem sufficient, but there should be a consent to that particular will: besides, this is going beyond her power, which did not extend to the making an executor. This is rather an appointment which in equity will control the administration as to the leasehold estate than a will; and as there may be other effects not covered by the deed, the return is ill, and there must be a peremptory mandamus.

In *Scammell v. Wilkinson* (*t*), T., 42 Geo. 3, prohibition is to the spiritual courts, if a suit be instituted to obtain a *general* probate of the will of a woman made during coverture, though *with* her husband's consent, and though she *survived* him; for he could not by any assent of his enable her to dispose by any will made during her coverture of property, which she might acquire after

Will of Wife after the death of Husband.

(*p*) That the will of a *feme covert* cannot be given in evidence till it has been proved in the ecclesiastical court, see also *Stone v. Forsyth*, 2 Doug. Rep. 707, where Lord Mansfield says, if the ecclesiastical court will not grant probate, the proper course is to appeal to the Delegates. Mr. Douglas (in note †, *ibid.* p. 150) observes, that the

regular course in cases like this, is for the spiritual court not to give probate of the will, but *administration* with the will as a testamentary paper annexed.

(*q*) Burrow, 431.

(*r*) Law of Test. 37.

(*s*) Stra. 891.

(*t*) 2 East's Rep. 552.

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his death, but only of property over which he himself had a disposing power.

[But the will of a *feme covert*, made during coverture in virtue of powers vested in her by a marriage settlement, is not revoked by her surviving her husband (*u*). The queen consort may make her will like a *feme sole* (*x*), and so may a woman whose husband is banished by act of parliament (*y*); and if a married woman who is a foreigner be entitled by the law of her domicile to make a will, die in this country, probate will be granted of her will here (*z*).—ED.]

But if a *feme covert* is executrix to some other person, and in that right hath divers goods and chattels, these are not divested out of her, because she hath them not merely to her own use, but as representing the person of another; and therefore in this case (Swinburne says) the wife may, for the continuation of the executorship, make an executor, and consequently a testament, without the consent or assent of her husband (*a*).

See this doctrine agreed by Lord Thurlow, C., in *Hodsdon v. Lloyd* (*b*).

Feme covert
Executrix to
some other
Person.

But if an executrix use the goods of a testator as her own, and afterwards marry, and then treat them as the goods of her husband, she will not be allowed to object to their being taken in execution for her husband's debts (*c*).

But this rule, that a *feme covert* executrix may make her will of those goods whereof she is executrix, is restrained in two cases:

The first is, where she doth not make an executor, but bequeaths the goods whereof she is executrix by devise or legacy: in this case the will is void, because an executor may not dispose of the goods of the testator otherwise than to the use of the testator, to the payment of his debts and performance of his will; and therefore may not give or devise the same by legacy, for that were to dispose of the testator's goods as if they were the proper goods of the executor, and to convert the same to the private use of the legatee, and not the use of the testator. But when an executor doth only make another executor, the second executor doth stand chargeable and accountable for the distribution of the first testator's goods to the use of the same testator as did the former executor, and is not by the laws of the land reputed for the executor of the executor, but of the former testator, and so is not a legatee (*d*).

(*u*) [*Morwan v. Thompson*, 3 Hagg. 239.]

(*x*) [2 Bla. Comm. 498.]

(*y*) [*Portland v. Prodgers*, 2 Vern. 104; *Compton v. Collinson*, 2 Bro. C. C. 385.]

(*z*) [*In the goods of Maraver* (a Spaniard), 1 Hagg. 498.]

(*a*) Swin. 89; Law of Test. 34.

(*b*) 2 Bro. C. C. 543, *et seq.*; [2 East, 556, 557; 1 Roper on Husband and Wife, 189.]

(*c*) *Quick v. Sir Wm. Staines*, 1 Bos. & Pul. 293.

(*d*) Law of Test. 35, 36; Swin. 90.

The second is, where she is not only executrix, but legatee also, and hath accepted of the thing bequeathed not as executrix, but as legatee; and in this case the will of the *feme covert* is also void. For she, taking the thing bequeathed not as executrix but as legatee, doth thereby make it her own proper goods, and consequently her husband's, and therefore cannot be given from him without his licence or consent. If it doth not appear whether the wife took the thing bequeathed as executrix or legatee, it shall be presumed she took it as executrix (e).

Feme covert
Executrix to
some other
Person.

And although a *feme covert*, being executrix, may make her testament and appoint an executor of those goods which she hath as executrix, and not as legatee, without her husband's assent; yet the profit and fruit which arise out of those goods which she hath as executrix during the marriage, as calves, lambs, and such like profit of kine, sheep, and cattle, do belong to the husband, and not to herself as executrix; and therefore she cannot make her testament of such fruits and profit without her husband's approbation (f).

Civilians, whilst they declare that force and fraud vitiate a will, tolerate those alluring manners and that engaging address by which infirm testators are too often induced to disinherit their immediate heirs (g). But with two exceptions: 1. Unless the testator be induced to make his will by false suggestions and lies, which are in truth a species of fraud; 2. Unless prayers and intreaties be so frequently repeated that they operate as a sort of force (h).

That testament is to be repelled which is made upon just fear, that is, such a fear as may move a constant man, as the fear of death, or of bodily hurt, or of imprisonment, or of the loss of all or most part of one's goods, or the like; whereof no certain rule can be delivered, but it is left to the discretion of the judge, who ought not only to consider the quality of the threatenings, but also the persons as well threatening as threatened: in the threatening, his power and disposition; in the person threatened, the sex, age, courage, pusillanimity, and the like. But if the testator afterwards, when there is no cause of fear, do ratify and confirm the testament, it seemeth to be good in law (i).

Person under
fear or re-
straint.

If a man makes a will in his sickness, at the over importunity of his wife, to the end he may be quiet, this shall be said to be a will made by restraint, and shall not be good (k).

Importunity.

(e) Swin. 90; Law of Test. 36.

authorities there cited.

(f) Ibid.

(i) Swin. 475, 476; [Godolph.

(g) Dig. 28, 5, 70, and 29, 6, 3; Cod. 6, 34, 3; Sande, lib. iv. tit. 1. Def. 11.

pt. i. c. 9.]

(h) See Sande *ubi supra*, and Swinburne, part vii. sects. 4, 18, with the

(k) [By Rolle, C. J. in *Hacker v. Newborn*, Styl. 427; see too *Lamkin v. Bebb*, 1 Lee, 1; *Money Penny v. Brown*, 8 Vin. Ab. 167.]

Importunity.

[If actual force were used, however perfectly the party might be in his senses, and however accurate his compliance with the requisite formalities, the will so procured is a nullity (*l*). The fear which prevents the *libera voluntas* requisite for the making of a will must be such as *cadere in constantem virum posset* (*m*).—ED.]

But if the person who makes the motion be not any ways suspected, and it also appears by some conjectures that the sick person had a desire to make his will, in this case the testament is good (*n*).

[The question is, whether he had *liberum animum testandi* (*o*).

[Importunity, to render a will invalid, must be such as take away free agency from the testator, such as he is in too weak a condition to resist (*p*); and therefore, though a testament made by interrogatories may be valid, it is watched with greater jealousy by the court of probate than an ordinary case (*q*).

Influence.

[So as to influence, in order to vitiate a will, it must, like importunity, rise to such a degree as to destroy the free agency of the testator—to be tantamount to force or fear in coercing him. But neither affection nor flattery, nor honest persuasion, nor capricious partiality, destroy the validity of a testamentary act (*r*); nor is it necessary that the will should originate with the testator, provided he understands and sanctions the disposition suggested to him (*s*).

Persuasion
on a Death-
bed.

[But persuasion used to a testator on his *death-bed* may amount to the effect of force or fear (*t*). And where a dominion has been acquired over a person who may be sane for general purposes, and capable of managing his affairs in general, so as to prevent the exercise of the discretion he usually exercises in the particular case of making his will, such dominion, Chief Baron Eyre says, would vitiate the will, though very difficult of proof (*u*). Of such a character, it should seem, might be influence unduly exerted on religious feelings (*x*). In *Wyatt v. Ingram*, the will was made in favour of the attorney and agent of the testator, prepared from instructions conveyed by

(*l*) [*Mountain v. Bennet*, 1 Cox. 355, by Chief Baron Eyre.]

(*m*) [*Godolph.* pt. iii. c. 25, s. 8; *Swin.* pt. vii. s. 2, pl. 7.]

(*n*) *Law of Test.* 53.

(*o*) [2 *Bla. Comm.* 497.]

(*p*) [*Kindbride v. Harrison*, 2 *Phil.* 551.]

(*q*) [*Green v. Skipworth*, 1 *Phil.* 58.]

(*r*) [*Williams v. Goude*, 1 *Hagg.* 581; *Bird v. Bird*, 2 *Hagg.* 142; *Constable v. Tuffnell*, 4 *Hagg.* 485.]

(*s*) [*Constable v. Tuffnell*, 4 *Hagg.* 477; 3 *Knapp*, pt. i. 122; *Wise v. Johnson*, 1 *Lee*, 600.]

(*t*) [*Mynn v. Robinson*, 2 *Hagg.* 179; Sir W. Wynne, in *Dickinson v. Moss*, 1790; *Higginson v. Colcot*, 1 *Lee*, 138.]

(*u*) [*Mountain v. Bennet*, 1 *Cox*, 355.]

(*x*) [*Norton v. Relly*, 2 *Eden*, 286; *Huguenin v. Boseby*, 14 *Ves.* 273.]

the father of the attorney, and the codicil by the attorney himself: this will was declared invalid by the prerogative court of Canterbury (Sir J. Nicholl), whose sentence was appealed from to the Delegates; they being equally divided in opinion, a commission of adjuncts was issued, which reversed the sentence of the court below. A commission of review was applied for and refused (*y*). In *Tyrrell and Harding v. Marsh*, Sir John Nicholl set aside a will made under a power by a *feme covert*, on the ground that it had been obtained by the undue influence of her husband after her faculties were impaired. His decision was appealed from to the Delegates, who gave no sentence. A commission of review was issued, when the parties entered into a compromise and reversed the sentence by consent (*z*). In *Trimlestown v. Dalton*, on appeal from the Irish Court of Chancery to the House of Lords, it was held that undue influence might vitiate the provisions in the will favourable to the person exercising such influence, without destroying the validity of the will as far as it respected other parties (*a*).—ED.]

Importunity,
&c.

If a will be proved to have been obtained by fraud or force, it will be set aside in the proper court (*b*). And when legacies were procured by fraud, the Court of Chancery has in many cases decreed them to be trusts (*c*). *Error* may also in some cases affect a will, especially if it appear that the testator was solely actuated by an almost insuperable mistake, which has made him neglect the performance of some urgent duty: for the presumption is, that had he not been led into an error, he could not thus have willed. And this is the case mentioned by Cicero in his treatise *De Oratore* (*d*), and quoted by Grotius (*e*), and by Lord Mansfield in *Brady v. Cubitt* (*f*). “What cause,” says Cicero, “could be of greater moment than that of the soldier, whose death being announced at home by a false messenger from the army; the father believing the report, altered his will, appointed another person his heir, and died? The affair was brought before the centumvirs when the soldier returned home and sued for his paternal inheritance, as a son passed over in his father’s will, namely, the question of civil law in that cause was, ‘Can a son be disinherited of his paternal goods, whom his father has neither appointed heir by his testament nor disinherited by name?’” The last reason mentioned by the author would have been sufficient to annul the

Fraud or
Force.

(*y*) [1 Hagg. 384; 3 Hagg. 466. See cases cited in *note*.]

(*z*) [1 Hagg. 84; 3 Hagg. 471.]

(*a*) [1 Dow, New Series, 85. See also *Mynn v. Robinson*, 2 Hagg. 179, cited above.]

(*b*) See 1 Cha. Rep. 24; *Herbert v. Lowndes*, 8 Vin. Abr. 165; *Goss*

v. Tracy, 1 P. Wms. 287.

(*c*) Treatise on Equity by Fonblanque, vol. i. p. 64; vol. ii. p. 380; *Herbert v. Lowndes*, 1 Cha. Rep. 14.

(*d*) Lib. i. c. 38.

(*e*) De J. B. et P. 2, 9, 6.

(*f*) 2 Doug. Rep. 39.

will as *testamentum inofficiosum*, by the civil law, but the *error* which induced the father to alter his will, seems also to be relied on by Cicero, and it is in this view of the case that the passage is quoted by the two latter great authorities. It must however be very difficult to establish by evidence, except in a case equally strong with that here put, that any alleged error, false rumour, or misrepresentation operated so irresistibly on the mind of a testator as to be the sole efficient cause that induced him to make, or to alter his will in a particular manner. And perhaps such a presumption would not be sustained, except in a case where the error was equally unavoidable, and the intention of the testator equally apparent, as well as his duty equally urgent, with those of the father above-mentioned (*g*). [Probate of the will of Colonel Napier, reported as killed at the battle of Corunna (1809), was revoked on the personal appearance of that gallant officer before the judge of the Prerogative Court, who ordered the will to be delivered to him (*h*).—ED.]

Person circumvented by Fraud.

Stephenton v. Gardiner, T., 1725 (*i*). A bill was brought to set aside a will relating to a personal estate only, and to stay the probate thereof, setting forth that the will was gained by fraud, and by misrepresenting the plaintiffs, who were the half brothers and sisters of the testatrix; and alleging, that the will was falsely read to her; and setting forth divers instances of fraud, on the part of the defendants, in procuring this will. The defendants, as to that part of the bill which sought to set aside the will, and to stay the proceeding, demurred to the jurisdiction of the court: forasmuch as upon the face of the bill it appeared that the plaintiffs were improper to sue here, in regard the spiritual court had the proper cognizance of wills relating to personal estates, and could determine fraud concerning them. After which, motions were made before the lords commissioners and the Lord Chancellor King for an injunction. But the court was against it; for the spiritual court hath jurisdiction of fraud relating to a will of a personal estate, and can examine the parties by allegation touching this fraud, and if the will was falsely read to the testatrix, then it is not her will.

Archer v. Mosse, T., 1686 (*k*). The testator, when in perfect health, had made his will, and thereby gave to the plaintiff Archer, his nephew, the greatest part of his personal estate, to the value of 5000*l*. But one Bridget Sandyman, his maid servant, had in his sickness prevailed upon him to make another will, and to marry her a week before his death, when

(*g*) See *Bodmin v. Roberts*, 3 Ch. 17, *Anon.*]

Ca. 61; *James v. Greaves*, 2 Peere Wms. 270; [*Bennett v. Wade*, 2 Atk. 243, 424; *Webb v. Claverden*, 3 Atk.

(*h*) [1 Phill. 83.]

(*i*) 2 P. Wms. 286.

(*k*) 2 Vern. 8; *vide infra*, Probate.

he lay in his sick bed, at six of the clock at night, though it was really proved by two ministers, that she was a year before actually married to the defendant Mosse, and was then his wife, and that Mosse procured the licence for the marriage of the testator to Bridget; and this will being set up by Mosse (executor to Bridget), though it appeared that there was as gross a practice as could be in the gaining the will, the testator being *non compos mentis* both at the time of making the will, and also at the time of the supposed marriage, and that in his health he knew that Mosse and Bridget were married, and that Bridget suppressed the first will; yet that will so set up, being proved in the Prerogative Court, and the matter in question relating only to a personal estate, the lord chancellor was of opinion, that whilst the probate stood, the matter was not examinable in chancery; and though the fraud was fully proved and opened to him, he would not hear any proofs read, but dismissed the bill.

But though a will gained by fraud, and proved in the spiritual court, is not to be controverted in equity; yet if the party claiming under such a will comes for equity in the Court of Chancery, he shall have it (*l*).

Court of Equity cannot relieve from a Will fraudulently gained.

Gosse v. Tracy, M., 1715 (*m*). It being urged, that a will concerning *land* is only triable at common law, and that the party there may take advantage of any fraud or imposition on the testator, and therefore not proper to be examined into or set aside in equity upon pretence of fraud or surprise; the lord chancellor held, that there might be fraud in obtaining a will that might be relievable in equity, and of which no advantage could be taken at law; as if a man agree to give the testator 2000*l.* in bank bills, if he will devise his estate to him, and on the delivery of such bills makes his will, and deviseth his estate unto him, and the bills prove to be forged or counterfeited.

But in the case of *Bransby v. Herridge* (*n*), called also *Kerrick v. Bransby* (*o*), July 28, 1728, in the House of Lords, it was decreed, that a will of a real estate could not be set aside in a court of equity for fraud or imposition, but must be tried at law on *devisavit vel non*, being a matter proper for a jury to inquire into. [And a will of personalty may be annulled for fraud in the ecclesiastical court; so the party cannot be without his remedy (*p*).—ED.]

(*l*) 2 Vern. 76.

(*m*) 2 Vern. 700.

(*n*) Law of Test. 60; Vin. Devise, Z. 2, pl. 11.

(*o*) 3 Bro. P. C. 353.

(*p*) See also *Bennett v. Wade*, 2 Atk. 324; *Webb v. Claverden*, 2 Atk. 424; *Jones v. Jones*, 3 Meriv. 161;

Jones v. Frost, Jacob, 466. So earlier cases prove that the Court of Chancery once assumed the power of relieving against fraud in obtaining probate of wills. See cases collected in a note by Mr. V. Williams, p. 39, vol. i. Ex. and Adm.—ED.]

Persons Deaf
and Dumb.

Those who are deaf and dumb by nature, cannot make any kind of testament or last will; unless it do appear by sufficient arguments, that such person understandeth what a testament meaneth, and that he hath a desire to make a testament; for if he have such understanding and desire, then he may by signs and tokens declare his testament (*q*).

Blind.

Dr. Ayliffe says, generally, that persons who are blind cannot make their wills (*r*).

But Dr. Swinburne says, he that is blind may make a nuncupative testament, by declaring his will before a sufficient number of witnesses. And he may make his testament in writing, provided the same be read before witnesses, and in their presence acknowledged by the testator for his last will. But if a writing were delivered to the testator, and he not hearing the same read, acknowledged the same for his will, this would not be sufficient; for it may be that if he should hear the same read, he would not acknowledge the same for his will (*s*).

And it seemeth best, that it be read over to the testator, and approved by him, in the presence of all the subscribing witnesses; and this the civil law did expressly require in the case of a blind man's will. But in England this strictness seemeth not to be precisely requisite, if there shall be otherwise satisfactory proof before the court that the identical will was read over to him, although it was not in their presence: and sometimes the single oath of the writer hath been allowed sufficient by the Court of Delegates, to prove the identity of the will. [But in *Longchamp v. Fish* (*t*), it was held that in a will of lands, it need not be read over to a blind person (*u*).—Ed.]

And what precautions are necessary for authenticating a blind man's will, seem in like degree requisite in the case of a person who cannot read. For though the law in other cases may presume, that the person who executes a will knows and approves of the contents thereof; yet that presumption ceaseth, where by defect of education he cannot read, or by sickness he is incapacitated to read the will at that time (*x*).

Traitor.

Whosoever is lawfully convicted of high treason, by verdict, confession, outlawry, or presentment; besides the loss of his life, shall forfeit to the king all his goods and chattels, and all such lands, tenements and hereditaments as he shall have in his own right, use or possession, of any estate or inheritance, at the time of such treason committed, or at any time after; and so consequently is intestable. Insomuch that traitors are not only deprived of making any testament, or other kind of

(*q*) Swin. 95; [Godolph. pt. 1, c. 11.]

(*r*) Ayl. Par. 531.

(*s*) Swin. 96.

(*t*) [2 New Rep. 415.]

(*u*) [See also *Barton v. Robins*, 3 Phill. 455, n. 6.]

(*x*) [Ibid.]

last will, from the time of their conviction: but also the testament before made doth by reason of the same conviction become void, both in respect of goods, and also in respect of lands, tenements and hereditaments (*y*).

But if any person, being attainted of treason, obtain the king's pardon, and be thereby restored to his former estate; then may he make his testament, as if he had not been convicted, or if he make any before his conviction and condemnation, the same by reason of such pardon recovereth its former force and effect (*z*).

But if a traitor hath goods as executor to another, the same are not forfeited; whence it follows, that of such goods he may make his will (*a*).

If any person be condemned of felony, he ought to suffer death, and the king shall have all his goods, wheresoever they be found. And if he have any freehold, it shall forthwith be seized into the king's hands, and he shall have the profit thereof by the space of a year and a day, and also waste; and after the king hath had the year, day, and waste, the land shall be restored to the chief lord of the fee. Felons therefore lawfully convicted cannot make any testaments, or other dispositions, of any goods or lands; because the law hath disposed thereof already (*b*). Felon.

But a pardon restoreth them to their former estate (*c*).

If a man do willingly kill himself, his testament (if he made any) is void, both concerning the appointment of the executor, and also concerning the legacy or bequest of any goods; for they are confiscate (*d*). Felo de se.

But if the testament be of lands, it seemeth it is not void; because a *felo de se* doth not forfeit any lands of inheritance, for no man can forfeit his lands without an attainder by course of law (*e*).

An outlawed person is not only out of the king's protection, and out of the aid of law, but also all his goods and chattels are forfeited to the king by means of the outlawry, although he were outlawed but in an action personal; and although the action were not just, nevertheless his goods and chattels are forfeited, by reason of his contempt in not appearing: and therefore he that is outlawed cannot make his testament of his goods so forfeited (*f*). Outlaw.

Howbeit it seemeth, that he who is outlawed in an action personal, may make his testament of his lands, for they are not forfeited (*g*).

(*y*) Swin. 97.

(*z*) Ibid.

(*a*) Ibid.

(*b*) Ibid. 98.

(*c*) Ibid. [2 Bl. Com. 499; Godolph. pt. i. c. 12.]

(*d*) Swin. 106. [2 Bl. Com. 499. As to the executors or administrators

of the deceased traversing on inquisition of presentment of *felo de se*, see V. Williams on Exec. and Ad. vol. i. pt. 2, b. 3, c. 4.—Ed.]

(*e*) 3 Inst. 55.

(*f*) Swin. 107.

(*g*) Ibid. [2 Bl. Comm. 499.]

Also a man outlawed in a personal action may in some cases make executors; for he may have debts upon contract which are not forfeited to the king: and those executors may have a writ of error to reverse the outlawry (*h*).

Excommu-
nicate.

It seemeth to be the better opinion, that an excommunicate person may make a testament: unless he be excommunicate with that great curse, which is called anathema, which is not to be inflicted but upon great cause, with great deliberation and solemnity (*i*).

[This was before the 53 Geo. 3, c. 127, which by its third section removes all civil incapacities from parties excommunicated.

[It has been said that the queen consort may make her will, so may the king of his personal property, but it seems that the ecclesiastical court has no jurisdiction to grant probate of it. An application was made to induce the Prerogative Court of Canterbury to lend its process for the purpose of propounding and proving a testamentary paper of George the Third, but was refused by the judge, on the ground that no action or suit even in civil matters could be brought against the king (*k*).

[Alien friends may dispose of their personal estate in this country, but alien enemies, not fortified with the king's licence express or implied to reside in this country, are denied this liberty (*l*).

[For the wills of seamen, see Sect. III.—ED.]

II. *Of what Things a Will may be made. [And of Republication.]*

Lands.

Lord Coke says, at the common law (by which he must be understood to signify the common law since the Conquest) no lands or tenements were devisable by any last will and testament, nor ought to be transferred from one to another, but by solemn livery of seisin, matter of record, or sufficient writing; but by certain customs in some boroughs they were devisable (*m*).

But although lands might not be disposed by will, yet a device was found out, and a distinction made between the land and the use and profits of the land, whereby feoffments to uses came in practice; by virtue whereof a person might dispose of the profits, though he could not dispose of the land itself (*n*).

And the way was this: They conveyed their full estates of

(*h*) [Shaw v. Cutteris, Cro. Eliz. 251.] traced to the manners of the ancient Germans, of whom Tacitus observes:

(*i*) Swin. 10.

(*k*) [By Sir J. Nicholl, 1 Add. 262.]

(*l*) [Wentworth, c. 1, p. 35, 14th edit.; Bac. Abr. Wills, B. 17.]

(*m*) 1 Inst. 111. This principle of the common law may perhaps be

“Heredes successorisque sui cuique liberi. Nullum testamentum; si liberi non sunt proximus gradus in successione fratres, patruī, avunculi.” De Morib. Germ. c. 20.

(*n*) Wright's Tenures, 172.

their lands to friends in trust, properly called feoffees in trust; and then they would by their wills declare, how their friends should dispose of their lands; and if those friends would not perform it, the Court of Chancery was to compel them by reason of trust; and this trust was called the use of the land, so as the feoffees had the land, and the party himself had the use; which use was in equity to take the profits for himself, and that the feoffees should make such an estate as he should appoint them; and if he appointed none, then the use should go to the heir, as the estate itself of the land should have done; for the use was to the estate, like a shadow following the body (*o*).

But by this course of putting lands into use, there were many inconveniences; as, namely, a man that had cause to sue for his land, knew not against whom to bring his action, nor who was owner of it; the wife was defrauded of her thirds; the husband of being tenant by curtesy; the lord of his wardship, relief, heriot, and escheat; the creditor of his extent for debt; the tenant of his lease: for these rights and duties by the law were due from him that was owner of the land, and none other, which was now the feoffee of trust; and so the old owner, which we call the feoffor, should take the profits, and leave the power to dispose of the land at his discretion to the feoffee; and yet he was not such a tenant as to be seised of the land, so as his wife could have dower, or the lands be extended for his debts, or that he could forfeit it for felony or treason, or that his heir could be ward for it, or any duty of tenure fall to the lord by his death, or that he could make any leases of it (*p*).

Which frauds, by degrees of time as they increased, were remedied by divers statutes; as namely, by a statute of the 1 Hen. VI.; and by another of the 4 Hen. VIII., it was appointed, that the action may be tried against him which taketh the profits, which was the *cestui que use*; by a statute made in the 1 Ric. III., leases and estates made by *cestui que use* are made good, and estates by him acknowledged; by a statute in the 4 Hen. VII., the heir of *cestui que use* was to be in ward; and by a statute in the 16 Hen. VIII., the lord was to have relief upon the death of any *cestui que use* (*q*).

Which frauds nevertheless multiplying daily, in the end, in the 27th year of King Henry VIII., the parliament purposing to take away all those uses, and to reduce the law to the ancient form of conveying of lands by public livery of seisin, fine and recovery, did ordain, that where lands were put in trust or use, there the possession and estate should be presently carried out of the friends in trust, and settled and invested on him that had the uses, for such term and time as he had the use (*r*).

(*o*) Lord Bacon's Use of the Law,
152.

(*p*) Bac. 153.

(*q*) Bac. 153.

(*r*) Ibid. 154.

And by this statute of the 27 Hen. VIII., the power of disposing land by will, is clearly taken away amongst those frauds: whereupon in the 32 Hen. VIII. another statute was made, by which it is enacted, that "every person having any manors, lands, tenements, or hereditaments, holden in socage or of the nature of socage tenure, shall have full and free liberty, power and authority, to give, dispose, will and devise, as well by his last will and testament in writing, as otherwise by any act or acts lawfully executed in his life, all his said manors, lands, tenements, or hereditaments, or any of them, at his free will and pleasure."

And in the same statute there are several restrictions and limitations with regard to the devising of lands holden by *knight's service*; which were further explained by the statute of the 34 & 35 Hen. 8, c. 5.

And finally, by the statute of the 12 Car. 2, c. 25, tenures by knight's service were abolished, and all tenures turned into free and common socage.

So that now a man may by his will dispose of his whole landed property, except his copyhold and other customary lands, which are devisable or not, according to the custom of the respective manors. And generally, a devise of copyhold will not pass, without a surrender to the use of the will.

But in case of a *child*, or *widow*, it is otherwise; for a court of equity, in favour of these, will supply the defect of surrender (*s*).

So also where there is a general devise of real estate to pay *debts*, and there is no real estate but copyhold; the court will supply the defect of surrender for the benefit of creditors (*t*).

Also where a copyhold is in the hands of *trustees*, the person for whom the lands are holden in trust may devise the same without surrender: because, the legal estate being not in him but in the trustees, he cannot surrender (*u*).

And although the court will supply the defect of a surrender for the benefit of children; yet the rule doth not extend to *grandchildren*, or to a *natural child*, and consequently not to any more distant kindred (*x*).

Judd v. Prate (*y*). Testator devised "all the rest, residue and remainder of his real and personal estate to his nephews and nieces." It was held not sufficient for supplying the want of a surrender of copyhold land, contiguous and intermixed with the freehold, against the heir.

And where a man seised of copyhold lands, surrenders the same to the use of his will, and executes a will, although it is not attested by any witnesses, yet it shall direct the uses of the surrender; for the clause in the statute which requires the

(*s*) 2 Ves. 582; 5 Ves. 557.

(*t*) Ibid.

(*u*) 2 Atk. 38; 1 Ves. 489.

(*x*) 2 Ves. 582; 1 Wilson, 161; 6 Ves. 544.

(*y*) 13 Ves. 168.

testator's signing in the presence of three witnesses, is confined only to such estates as pass by the Statute of Wills of the 34 & 35 Hen. 8, which doth not extend to copyhold (z).

[Where lands encumbered are devised, *vide post*, "*Payment of Legacies.*"]

[This power of surrender was originally dependant wholly on special custom. Lord Thurlow, indeed, asserted its being impossible that a copyhold surrendered to the use of a will should not pass, thereby the custom must be bad which opposed it(a). Notwithstanding, however, Lord Thurlow's general proposition, particular customs were held paramount. But even where there was this custom, owing to the frequent neglect of making such surrender, many hardships and inconveniences arose; and there have been cases in which the Court of Chancery supplied a surrender. At last the statute of the 55 Geo. 3, c. 192(b), rendered valid the direct disposition of copyhold estates in all cases in which the same could before have been effected indirectly by the means of the above-mentioned previous surrender. Still, however, because there were manors without any record of such custom, and customary(c) estates not falling within the scope of this statute, and requiring deeds of trust to render them susceptible of devise, and because sometimes persons entitled to the full enjoyment of copyhold estates neglected to be admitted(d) to them, or were prevented by accident, and for other reasons(e), the recent Will Act, 1 Vict. c. 26, (repealing 59 Geo. 3, c. 192, as far as concerned copyhold estates), swept away all these difficulties, providing by its third section for the free disposal of all customary freeholds and copyholds without surrender, and before admittance, and for all such as cannot be now devised. *Vide post*, this act affecting all wills made on or after 1st January, 1838.—ED.]

By the 9 Geo. 2, c. 36, "No manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, whatsoever; nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given or appointed by will, to any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, in trust, or for the benefit of, any cha-

Lands to Charitable Uses (f).

[(z) 2 Atk. 37; 7 East's Rep. 299.

(a) [*Pipe v. White*, 3 Bro. C. C. 286. See also *Church v. Munday*, 15 Ves. 396; Com. Dig. tit. 38, c. 4, s. 2.]

(b) [*Doe v. Barth*, 5 B. & A. 492.]

(c) [*Doe v. Tofield*, 11 East, 246.]

(d) [*Right v. Banks*, 3 B. & A. 684, deciding that an heir could devise before admission.]

(e) [See Evan's Statutes, tit. Wills, note; Report of Real Prop. Comm. p. 9 (1833). And see testamentary incidents of copyhold discussed, p. 600 of vol. i., 688, 1220, 1257, of vol. ii., of Mr. Vaughan Williams' work on Ex. and Adm.; 2 Sharman's Powell on Devises, c. 7.]

(f) [See title *Charitable Uses*, vol. i.]

ritable uses: but the same shall be done by deed indented, twelve months at least before the death of the donor, to be inrolled within six months after the execution in the High Court of Chancery; and the same to take effect immediately after the execution for the charitable use intended (*f*).

Estate *pur*
auter vie.

By the statute of the 29 Car. 2, c. 3, s. 12 (*g*), "Any estate *pur auter vie* shall be devisable by a will in writing, signed by the party so devising the same, or by some other person in his presence and by his express directions, attested and subscribed in the presence of the devisor by three or more witnesses; and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, as assets by descent, as in case of lands in fee simple; and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands."

Pur auter vie.]—That is, being held by lease during the life of another person. These estates are freehold interests, but they are not entailable within the statute *De Donis*, and therefore no common recovery can be suffered of them, but the person who would have been tenant in tail, had the estate been an inheritance, is entitled to the absolute ownership, and may defeat the remainders, by some act *inter vivos*, or, as it would seem, by his will alone (*h*). These estates are frequently devised for life with remainder over, in which case Lord Hardwicke has observed, that the intent of the testator always is that the leases shall be renewed (*i*). But by Lord Thurlow, C., where an estate of limited duration is given to one for life, the intent is to give him whatever it shall produce during his life, and in that case, unless there are strong expressions to show a (contrary) intention, the court cannot compel him to renew (*k*). But if he renews, he shall not renew for his own use alone, but shall be a trustee for the remainder-man, who on his part shall contribute towards the expense of the renewal. And the question has been, in what proportion? Where both parties taking were alive, the tenant for life has usually been directed to pay one-third, and the remainder-man the other two-thirds. But this rule appears to have been disapproved of by Lord Macclesfield and by Lord Thurlow, and seems ill calculated to make the sums contributed, in every instance, proportionable to the benefit

(*f*) See *Mortmain*. [And Mr. V. Williams on Exec. and Adm. vol. ii. 751 and 787.]

(*g*) [As to the law, &c., on this subject before this statute, see Bl. Com. b. ii. c. 16; Rep. of Real Prop. Comm. p. 9, (1833).]

(*h*) See *Doe on the dem. of Blake v. Luxton*, 6 T. Rep. 289; *Grey v. Mannock*, id.; and *Blake v. Blake*, 3 P. Wms. 10, in note.

(*i*) *Verney v. Verney*, 1 Vez. 430.

(*k*) *Stone v. Theed*, 2 Bro. 243.

acquired. Where the tenant for life has renewed and dies, the time he has actually enjoyed the estate may be considered in settling the proportion between his representatives and the remainder-man. Thus lands in mortgage being devised to A. for life, remainder to B. and his heirs, A. entered and bought up the mortgage, taking an assignment in trustees' names and died. B. the remainder-man preferred his bill against the defendant, the representative of A., to redeem the mortgage, and his counsel insisted that he ought to pay but two-thirds of what was due on the mortgage, and the other third ought to be allowed by the defendant, by reason that the tenant for life enjoyed the profits during his life; but the court said, that if the remainder-man had come to redeem in the lifetime of the tenant for life, then he should have allowed a proportion of the money with respect to the value of the respective estates of the tenant for life and remainder-man; but he being now dead, and having enjoyed the estate but one year only, the defendant must make an allowance only for the time that A. enjoyed the estate (*l*). Where leases renewable and directed by the will to be renewed, were given together with the rest of the personal estate, as a general fund charged with annuities, &c. to trustees, to pay the rents and profits to A. for life, remainder to B., Lord Thurlow, C., held that the expense of renewal was not to be apportioned between the tenant for life and remainder-man, but to be paid out of the profits of the estate in the first instance (*m*).

Special Occupant.]—A special occupant is, where an estate for life is made to a man and his heirs; in such case, the heir shall have the estate, after the decease of his ancestor, as *special occupant*, or as a person particularly described, to whom the estate shall go after the lessee's death.

[This clause in the 29 Car. 2 put an end to *general occupancy* (*n*), the doctrine of which prevailed before the passing of this statute; but it was doubted whether it continued estates which determined when there was no *special occupant*, because they were not subject to *general occupancy*. There is no mention in the statute of copyholds, and it is held not to extend to them, because it could not be intended to prejudice the right of the lord; no mention is made also of incorporeal hereditaments, such as rents, &c., but it has been determined that where there is no *special occupant* or *quasi occupant*, the estate is continued for the lives during which it is granted and may be devised, and if not devised goes to the

(*l*) *Clyatt v. Batteson*, 1 Vern. 404.

(*m*) *Stone v. Theed*, 2 Bro. 243.

As to the rule laid down by his lordship for the renewal of terms, see *infra*. And that estates *pur auter*

vie are to be put into the inventory,

vide infra, *Inventory*.

(*n*) [See references in note to the foregoing page.]

executors or administrators (*o*). Nevertheless, there was no provision for the distribution (*p*) of the surplus after payment of debts as a personal estate till the 14 Geo. 2, c. 29, was passed (*q*). The 1 Vict. c. 26, includes, by s. 3, “estates *pur autre vie*, whether there shall or shall not be any special occupant thereof,” among the objects over which a full testamentary power may be exercised on or after the first day of January, 1838.—ED.]

Mortgagee.

One that hath money to be paid to him on a mortgage, may devise this money when it comes (*r*).

And if the feoffee in mortgage, before the day of payment which should be made to him, maketh his executors and die, and his heir entereth into the land as he ought; it seemeth in this case, that the feoffor ought to pay the money at the day appointed to the executors, and not to the heir of the feoffee: but yet the words of the condition may be such as the payment shall be made to the heir; as if the condition were, that if the feoffor pay to the feoffee or to his *heirs* such a sum at such a day, there after the death of the feoffee, if he dieth before the day limited, the payment ought to be made to the heir at the day appointed (*s*).

And hereby it appeareth, that the executors do more represent the person of the testator than the heir doth that of the ancestor; for though the executor be not named, yet the law appoints him to receive the money, but so doth not the law appoint the heir to receive the money unless he be named (*t*).

[With respect to the title of an executor or administrator of a mortgagee to the mortgaged property, this will depend *at law* whether the mortgage is in fee or for years: in the former case the legal estate in the land descends to the heir; in the latter, like any other term of years, to the executor. But as to the money due upon the mortgage, it has been fully established *in equity* that it shall be paid to the executor or administrator of the mortgagee, even where the mortgage is in fee, and there is neither bond nor covenant for the money; whatever be the form of the mortgage, it is part of the *personal* estate of the mortgagee (*u*).—ED.]

Advowson.

A person may devise by his will the right of presenting to the next avoidance, or the inheritance of an advowson. And

(*o*) [*Bearpark v. Hutchinson*, 7 Bing. 178; *Ripley v. Waterhouse*, 7 Ves. 425.]

(*p*) [*Zouche v. Forse*, 7 East, 186.]

(*q*) [The reader is referred for a fuller account to V. Williams on Ex. and Ad. vol. i. 469; and vol. ii. 981, 1189; and to the Fourth Report of the Real Property Commissioners.]

(*r*) God. O. L. 391.

(*s*) 1 Inst. 209, 210.

(*t*) Ibid.

(*u*) [*Thornbrough v. Baker*, 1 C. C. 283; *Winne v. Littellton*, 2 C. C. 51; *Canning v. Hicks*, 2 C. C. 187; *Tabor v. Tabor*, 3 Swanst. 636; *Longuet v. Scower*, 1 Ves. sen. 406; Coote on Mortgages, 2d ed. 617; see Vaughan Williams on Ex. & Ad. vol. i. p. 472.]

if such devise be made by the incumbent of the church, the inheritance of the advowson being in him, it is good, though he die incumbent; for though the testament hath no effect but by the death of the testator, yet it hath an inception in his lifetime: and so it is, though he appoint by his will who shall be presented by the executors, or that one executor shall present the other, or doth devise that his executors shall grant the advowson to such a man (x).

[The next presentation to a church is a chattel personal, and goes to the executor and not to the heir (unless the incumbent be also seised in fee of the advowson (y)); and it is now settled, that where a person seised of an advowson in a *politic* capacity dies during a vacancy, it goes to the executor, as where a prebend has an advowson in right of his prebendary (z). The 30th sect. of 1 Vict. c. 26, enacts, that from and after the 1st of July, 1838, no devise to trustees or executors, except for a term, or a *presentation to a church*, shall pass a chattel interest.

Next Presentation to a Church.

30th sect. of 1 Vict. c. 26.

[In a case where an advowson had been bequeathed by will, and the will was litigated, the legatee of the advowson consulted Sir W. Scott (Lord Stowell) as to how he could prevent the bishop from collating by lapse, and whether the bishop could refuse to institute the legatee who was in holy orders. The answer was—

Lapse where Advowson is litigated.

["I think it will be proper for Mr. L. to petition for institution. In case the bishop should refuse to institute him, I conceive that an injunction might be obtained from the Court of Chancery to restrain the bishop from collating by lapse pending the suit.—W. Scott, Doctors' Commons, Dec. 14, 1796."

Lord Stowell's Opinion.

["I have written this upon the supposition that it was necessary to have the suit in the ecclesiastical court determined. But I conceive that this is not necessary, and that the presentation might be good, although the will was not proved in the ecclesiastical court.—W. S."—ED.]

But where an advowson was devised *to the first or other son of B. that should be bred a clergyman and be in holy orders, and if B. should have no such son, to C.*; both devises were holden by the Court of Common Pleas to be void, as depending on too remote a contingency; for the rule of law is, that the contingency on which such an executory devise hinges, *must take effect* within some life in being, or twenty-one years afterwards; but it was uncertain that the son of B.

(x) Wats. c. 10.

p. 459.]

(y) [See title *Advowson*; and generally this title, and *Benefice*, vol. i.; and V. Williams on Ex. & Ad. vol. i.

(z) [*Rennell v. Bishop of Lincoln*, 8 Bing. 496; 1 Cl. & F. 527; see title *Benefice*, vol. i.]

Lands contracted for, but not conveyed.

if he ever should have any, would take, or be able to take orders within twenty-one years of the death of his father (*a*).

If upon articles for a purchase, the purchaser die, having devised the land before a conveyance executed, the land will pass in equity; for the testator had an equity to recover the land, and the vendor stood trustee for the testator, and as he should appoint, till a conveyance executed (*b*).

For the vendor of the estate is, from the time of his contract, considered as a trustee for the purchaser; and the vendee, as to the money, is considered as a trustee for the vendor (*c*).

So if a man covenants to lay out a sum of money in the purchase of lands generally, and deviseth his real estate before he hath made such a purchase, the money to be laid out will pass to the devisee (*d*).

But if a man, having made his will, afterwards contracts for the purchase of lands, the lands contracted for will not pass by the will, but descend to the heir at law (*e*).

But if a good title cannot be made of the lands, as the heir in such case cannot have the lands, so he shall not have the money intended to be laid out (*f*).

Contingent Remainders and future Interests.

[An opinion seems to have prevailed that neither contingent remainders, nor any other contingent estates or interests in land, could pass by a will made previous to their vesting; but modern decisions have established the power of disposing by testament of contingent and executory estates and possibilities accompanied with an interest, and of such as would descend to the heir of the object of them dying before the contingency, an event on which the vesting or the acquisition of the estate depended (*g*).

[But it seems there was not equally a power of testamentary disposition in those cases where neither the contingent interest is itself transmissible from any person until the contingency decides him to be an object of the limitation, nor the person or persons to or amongst whom the contingent or future interest is directed, is or are in any degree ascertainable before the contingency happens (*h*). These cases are provided for by s. 3 of 1 Vict. c. 26.—ED.]

(*a*) *Proctor v. The Bishop of Bath and Wells and others*, 2 H. Bla. 358. *Vide infra*, "Form and Manner."

(*b*) 1 Chanc. Cas. 39; *Greenhill v. Greenhill*, 2 Vern. 679.

(*c*) 1 Atkyns, 573.

(*d*) *Ibid.*

(*e*) *Ibid.*

(*f*) *Ibid.*

(*g*) [*Selwyn v. Selwyn*, 2 Burr. 1131; 1 Bl. Rep. 222, 251; *Moor v. Hawkins*, 2 Eden, 342; 1 H. Bl.

R. 33; *Roe d. Perry v. Jones*, 1 H. Bl. R. 30; *Perry v. Phelps*, 1 Ves. jun. 251; V. Williams on Ex. & Ad. vol. i. 480, 636; Fearne's Contin. Rem. 8th ed. 366, &c. As to what words will pass a fee simple or an estate for life, see below, *Form and Manner*.]

(*h*) [See Lord Langdale's Speech in the House of Lords, Feb. 23, 1837.]

If a man have a lease for never so many years, determinable upon life or lives, that is, if such or such live so long; this estate may well enough be given and disposed by will, because it is but a chattel (*i*). Lease.

A lease for years may also be devised to A. for life, remainder to B. And if the lease be renewable, and A. renew, B. shall contribute to the fine so partaking of the benefit of the renewal. A. was tenant for life of a lease for years, the remainder of which was limited to B. A. renewed for twenty-eight years, when twelve years of the old lease was yet to come, and enjoyed it nine of the twenty-eight. Per Lord Thurlow, C.: The master ought to take the sum paid by her for the renewal of the lease as the value of the term purchased, that is, of the term of twenty-eight years, to commence at the expiration of twelve years. He should then consider the value of the term of nine years after the existing term, and what the term of nineteen years after the existing term and nine years was worth, and the latter is the proportion to be paid by the remainder-man. Then as to the kind of interest to be allowed, simple interest will not be a satisfaction, as she laid out her money totally, and the value of the lease was calculated upon the ground of compound interest; compound interest must therefore be computed upon the proportional value of the nineteen years' term, to the whole expense of renewal. But as in compound interest you go upon the idea that the interest is paid upon the exact day, and immediately laid out, which is impossible, it will be sufficient to compute compound interest at four per cent. And this is only to be paid till her death, for after that her executors had the demand upon the remainder-man, and it becomes a common debt, and must carry simple interest only; and A. having renewed a second time before the expiration of the first renewal, from which second renewal she derived no benefit, his lordship held, that her executors were entitled to the whole of the expenses, at the same rate of interest; for as on the one hand the tenant for life cannot renew for his own benefit, so on the other, the remainder-man shall not have the renewal at his expense (*j*).

Mr. Wentworth says, if one having a lease for many years, as an hundred, five hundred, more or less, doth devise and bequeath the same to A. and the heirs male of his body, and, for want of such issue, to B. and the heirs male of his body; and A. dieth, having issue a son; the term shall not go to his son, but to his executor or administrator: for it cannot be made a matter of inheritance. So, if A. had died without issue male, the term should not have gone or remained to B., but to the executor or administrator of A. (*k*). Term for Years.

(*i*) Went. 19.

Ex. & Ad. vol. i. p. 462.]

(*j*) *Nightingale v. Lawson*, 1 Bro. 440. [See Vaughan Williams on

(*k*) Went. 45.

So if an advowson, or any other hereditament, granted or devised to one and his heirs for a hundred years; or if such a termor grant a rent out of the land to A. and his heirs, or to the heirs or heirs male of his body; yet shall the same go to the executor, and not to any heir; for it being derived out of a chattel, cannot be any freehold or inheritance, but is itself a mere chattel (*l*).

Debts or
Things in Ac-
tion,

Albeit, by deed of gift made in the lifetime of any person to another of all his goods and chattels, debts or things in action do not pass; yet if the testator, by his last will and testament, do give or bequeath to another any debt due unto him, or a thing in action belonging unto him, the legacy is good and effectual in the law, and may be recovered in this manner, that is to say, if the testator do make the legatary executor of that particular debt or thing in action bequeathed, then the legatary, as executor thereof, may commence suit in his own name, and recover the same to his own use, against him by whom it was due; but if the testator do not make the legatary executor of the debt or thing in action bequeathed, then his remedy lieth in the ecclesiastical court, where he may convent the executor, and compel him either to sue for that debt in a court competent, and upon recovery and payment thereof to pay it over to the legatary, or else to make a letter of attorney to the legatary for the recovery of the debt or thing in action bequeathed in the name of the executor to the use of the legatary (*m*). At common law, a *chose in action* is neither assignable nor devisable; that is, the assignee must sue as attorney, and in the name of the original creditor, and the legatee as his executor: but courts of equity will protect the assignment of a chose in action, as much as the law will that of a chose in possession (*n*). And when the executor has received debts owing to the testator, he may be compelled to deliver them to the legatee in court of conscience, or in the spiritual court (*o*). If a debtor bequeath to his creditors the same or a larger sum than his debt, the rule of law is, that it shall be construed a satisfaction; but otherwise, if he order his debts and legacies to be paid, or it appear by the will that he meant to be both just and generous, for the rule is taken strictly (*p*). As to a presumed satisfaction of a debt by a legacy, there is no distinction between the case of a parent and child and that of strangers (*q*).

Things which
the Testator
hath not of
his own.

Albeit the testator have no such thing of his own as is bequeathed, yet nevertheless the legacy is good in law; there-

(*l*) Went. 54. [See Vaughan Williams on Ex. & Ad. vol. i. 463.]

(*m*) Swin. 187, 188.

(*n*) 2 Bl. Com. 442.

(*o*) Off. of Exec. 18 Ab. Eq. Ca. 175.

(*p*) *Richardson v. Greece*, 3 Atk. 65; *Chancey's case*, 1 P. Wms. 408. *Vide infra*, Form and Manner.

(*q*) *Tolson v. Collins*, 4 Ves. 483. [See Vaughan Williams on Ex. & Ad. vol. i. p. 555.]

fore, if the testator do bequeath a horse or a yoke of oxen, the legacy is good in law, though the testator have neither horse nor ox of his own. But who shall make choice, in this case, of the thing so bequeathed, is a question not to be neglected: and the solution is this; that if the words of the devise be directed to the legatary, as if the testator shall thus say, I will that A. B. shall have a horse, the choice doth belong to the legatary; but if the words be directed to the executor, as if the testator shall thus say, I will that my executor give to A. B. a horse, the election doth belong to the executor. Provided, nevertheless, that to whomsoever the election doth belong, whether to the legatary or to the executor, they must not be unreasonable in their election, but frame themselves according to the meaning of the testator; otherwise the legatary might make choice of the best horse in the country, and the executor of the worst, contrary to the meaning of the deceased (*r*). This doctrine is borrowed from the civil law, which permits a testator to will away not only his own property, but that of his heir or a stranger, so that his heir or representative shall be compelled to purchase the thing willed, whatever its price may be; or if the owner will not part with it, to pay the value of it, ascertained by the judge (*s*).

If there be two joint tenants of *lands*, and one of them deviseth that which to him belongs, and dieth; this is no good devise, and the devisee takes nothing, because the devise doth not take effect until after the death of the devisor, and then the surviving joint tenant takes the whole by prior title, to wit, from the first feoffment (*t*).

Things in
joint Te-
nancy.

And although the jointure is severed before the testator's death, yet if the will be made before the severance, it will have no effect: unless there is a republication of the will after the partition (*u*).

So, also, a man cannot give or bequeath by will any of those *goods* or chattels which he hath jointly with another; for if he should bequeath his portion thereof to a third person, this bequest is void by the laws of this realm; and the survivor, which had those goods or chattels jointly with another, shall have that portion so bequeathed, notwithstanding the said will (*v*). It should appear, therefore, that in this case the legacy is not good, even as *legatum rei alienæ*, any more than if an heriot or heir-loom be devised (*w*).

But otherwise it is with the tenants in common (*x*), and coparceners. For there is no survivor between coparceners, but the part of each is descendible, and consequently may be

Things in
Common.

(*s*) Inst. 2, 20, 4. For distinctions on this subject, see Vinnius and the commentators. *Ib.*

(*r*) Swin. 188.

(*t*) Gilbert on Wills, 120.

(*u*) *Swift v. Roberts*, Bur. Mans. 1496.

(*v*) Swin. 189.

(*w*) *Vide infra*.

(*x*) God. O. L. 131.

devised (*y*). And a deed of partition is not a revocation of a devise of his moiety by tenant in common (*z*).

Corn growing.

By the 20 Hen. 3, c. 2, "widows may bequeath the crop of their ground, as well of their dowers as other their lands and tenements; saving to the lords of the fee all such services as be due for their dowers and other tenements." And this is only in affirmance of the common law (*a*). But by the 27 Hen. 8, c. 10, "a married woman having a jointure made, shall not have any dowry of the residue of her husband's lands."

By the 28 Hen. 8, c. 11, s. 6, "if the incumbent before his death hath caused any of his glebe land to be manured and sown, at his proper costs and charges, with any corn or grain, he may make and declare his testament of all the profits of the corn growing upon the said glebe land so manured and sown."

But if the testator is lessee for years, and sow the land a short time before his lease expires, and then dies, before the corn can possibly be ripe within the term, in this case a devise thereof is void, because he himself could not have reaped it after the expiration of the term, if he had lived (*b*).

Things not yet in *Rerum Natura*

Not only that thing may be devised or bequeathed by the testator, which is truly extant, or hath an apparent being at the time of the making of the will or death of the testator; but that thing also which is not in *rerum natura*, whilst the testator liveth: therefore it is lawful for the testator to bequeath the corn which will be sown or grown in such soil after his death, or the lambs which shall come of his flock of sheep the next year, depasturing in such a field. But if there be no such corn growing in that soil, nor any lambs arising out of that flock, then the legacy is destitute of effect, because no such thing is extant at all, as was bequeathed. But if the testator devise a certain quantity of grain or number of lambs, as for the purpose, twenty quarters of corn or twenty lambs, and doth will and devise that the same shall be paid out of the corn which shall grow in such a field, or arise out of his sheep depasturing in such a ground; though not so much or no corn at all there grow, or not any or not so many lambs there arise, yet nevertheless the executor is compellable by law to pay the whole legacies entirely; because the mention of the soil and of the flock was rather by way of demonstration than by way of condition, rather showing how or by what means the said legacy might be paid, than whether it should be paid at all yea or no (*c*).

Things belonging to the Freehold.

Those things which after the death of the testator descend to the heir of the deceased, and not to his executor, cannot

(*y*) Co. Lit. 185 b.

(*z*) *Luther v. Ridley*, cited in 3 P. Wms. 169.

(*a*) 2 Inst. 80.

(*b*) Swin. 191. [See title *Vacation*.]

(*c*) Swin. 186. Vide Inst. 2, 20, 7, cum *Com. Vin.*

be devised by testament, except in such cases wherein it is lawful to devise the lands, tenements or hereditaments. And therefore if a man, seised of land in fee or fee tail, bequeath his trees growing upon the said land at the time of his death, this devise is not good, except as before ; but if he devise the corn (*d*) growing upon the same land at the time of his death, from the heir to some other person, this devise is good, albeit the land whereupon it groweth be not devisable. And the reason of the difference is, because the trees are parcel of the freehold, and descend, together with the land, to the heir, and not to the executor: but it is not so of corn; for the same shall go to the executor as parcel of the testator's goods. And therefore, if a man be seised of lands in the right of his wife, and sow the land, and devise the corn growing upon the same land, and die before the corn be reaped; in this case the legatary shall have the corn, and not the wife: but it is otherwise of grass, and herbs not separated from the ground, at the time of the death of the testator. If a man, seised in fee in right of his wife, do let the same lands for years to a stranger, and the lessee soweth the ground, and afterwards the wife dieth, the corn not being ripe; in this case the lessee may devise the same corn, notwithstanding his estate be determined. So also of tenant by curtesy, and tenant in dower (*e*).

And forasmuch as those things which after the death of the testator descend to the heir and not to his executor, are not devisable by will, except in such cases where lands, tenements and hereditaments are devisable; therefore those things which are affixed unto the freehold, are no more devisable than the freehold itself, as the windows, doors, wainscot, and such like (*f*).

So if a man be seised of a house, and possessed of divers *heir-looms*, that by custom have gone with the house from heir to heir, and by his will deviseth away these heir-looms, this devise is void; for the will taketh effect after his death, and by his death, the heir-looms by ancient custom are vested in the heir, and the law prefers the custom before the devise. And so it is, if the lord ought to have a heriot against his tenant, and the tenant deviseth away all his goods, yet the lord shall have his heriot for the reason aforesaid (*g*).

The testator may devise all goods and chattels which he

Things in
Executorship.

(*d*) [Or of any vegetable products of the earth, technically called "emblemments"—*emblavence du bled*—not merely corn and grain of all kinds, but every thing of an artificial and annual profit, produced by labour and manurance; even shrubs, &c. planted in nursery grounds, with an express view to sale, but not common, though perhaps artificial, grass. See the authorities collected on this point, by

Mr. V. Williams on Ex. and Ad. vol. i. p. 493.]

(*e*) Swin. 190. [For certain cases in which growing trees go to the executor, see *Stukely v. Butler*, Hob. 173; Went. Ex. 148, 14th ed.; Com. Dig. Biens (H); *Harlakenden's case*, 4 Co. 63.]

(*f*) Swin. 191; 4 Co. 64.

(*g*) 1 Inst. 185.

hath in his own right, but not those which he hath in the right of another as executor (*h*).

Things in
Administra-
tion.

An administrator cannot make a testament of those goods which he hath as administrator to any person dying intestate; because he hath not any such goods to his own proper use, but ought therewithal to pay the debts of the dead person, and to distribute the rest according to law (*i*).

Wife's goods
by the Hus-
band.

The husband cannot devise such goods as his wife hath as being executrix to another, nor such things as are in action, as debts due to her before marriage by obligation or contract, unless he and his wife recover the same during marriage, or that he renew the bonds, and take them in his own name: otherwise after his death they remain to her (*j*).

But the husband may, at any time during the coverture, release a bond given to his wife. And where the husband makes a *settlement*, the bonds to his wife, being part of her fortune, will, notwithstanding his death in the lifetime of his wife, before the security be changed, be decreed in equity to his executor, he being considered in that case as a purchaser for a valuable consideration (*k*).

Things ob-
tained after
the Will
made.

A man may by his will dispose of his chattels and personal estate that he shall for the future acquire, any time after the making his will to the time of his death. And this is necessary from the reason of the thing, because the chattels and personal estate are in a continual fluctuation; and if the law were not so, it would create very great confusion, or else would render it necessary for a man to make a new will every day (*l*).

But it is not so with lands, for they are fixed and permanent; and therefore if a man maketh his will, and deviseth therein all the lands which he shall have at the time of his death, and after that he purchaseth lands, and dieth without republication or making a new will, in this case, though his intent to the contrary is very apparent, yet it is a void devise; for a man cannot devise any lands but what he hath at the time of making his will. And this was adjudged upon great deliberation, by Holt, C. J. and the court, in the case of *Bunker v. Cook*, and the judgment was affirmed afterwards upon a writ of error in the House of Lords, Feb. 24, 1707 (*m*).

So copyhold lands purchased after a will do not pass by it, though surrendered by the use of the will (*n*). But by sect. 24 of 1 Vict. c. 26, every will, whether of realty or personalty,

(*h*) Swin. 185.

(*i*) Swin. 189.

(*j*) 1 Inst. 351.

(*k*) Cases in the time of L. Talb. 168. [As to the husband and the husband's executors' power over the wife's chattels, see V. Williams, vol. i. pp. 474, 527, 605.—Ed.]

(*l*) Gilb. 122.

(*m*) Gilb. 122. [*Bunker v. Cook*, 3 Bro. P. C. 19; *Butler and Baker's case*, 3 Co. 308.]

(*n*) *Harris v. Cutler*, B. R. Tr., 10 Geo. 3, cited by Lord Mansfield in *Spring v. Biles*, 1 T. Rep. 435; [see also *Churchman v. Ireland*, 1 Russ. & M. 250; and *Att.-Gen. v. Viga*, 8 Ves. 286; 6 Cru. D. 36.]

is held “to speak and take effect” from the time of the testator’s death; *vide infra*.

But, by Holt, C. J.:—If he republisheth his will, in such manner, and with such circumstances, as are necessary to complete execution of an original will, then the purchased lands will pass as by an original will (*o*). And in truth this seemeth to make it a new will, to all intents and purposes, and not a republication of the old one.

May pass by Republication.

[There seems to be two kinds of republication, express and constructive. Express, where a testator, avowing his designs of republishing his will, repeats the ceremonies necessary to its valid execution; thus, the Statute of Frauds would have required the attestation of three witnesses for realty, while copyhold and personalty required no attestation. Wills of personalty (*p*) seldom gave rise to questions of republication, as a residuary bequest embraced all that species of property of which the testator died possessed. Republication causes a will to speak and operate from the time at which it is republished. Constructive republication takes place when a testator makes a codicil to his will for any purpose (*q*), it which case the effect of the codicil, if not neutralized by internal evidence of a contrary intention, is to republish the will (*r*). Bearing in mind that the effect of such republication is to make the *will speak from the date of the codicil*, it will follow that all the newly acquired lands will fall under the operation of the residuary devise in the will, even though there be an express devise in the codicil of particular lands (*s*).

Republication:
1. Express.
2. Constructive.

[With regard to specific devises, the principle that the will speaks from the date of the republication is to be received with more caution and applied with more reserve (*t*). Republication by codicil or otherwise does not extend a *specific gift* in the will to property which that will was not originally intended to embrace, though answering to the same description (*u*). Re-

Of specific Devises.

(*o*) 11 Mod. 127.

(*p*) [See cases of *Long v. Aldred*, 3 Ad. 48; *Miller v. Brown*, 2 Hagg. 209.]

(*q*) [See cases of *Acherley v. Vernon*, Com. 381; 2 Eq. Ca. Ab. 769, pl. 1; *Potter v. Potter*, 1 Ves. sen. 437; *Pigott v. Waller*, 7 Ves. 98; *Goodtitle v. Meredith*, 2 M. & S. 5; *Guest v. Willasey*, 12 Moore, 223; *Doe v. Dory*, Cowp. 158; *Gibson v. Montfort*, 1 Ves. sen. 485; *Beckford v. Parnecott*, Cro. El. 693; *Barnes v. Crowe*, 1 Ves. jun. 486.]

(*r*) [For cases where such republication was negatived by the contents of the codicil itself, see *Bowes v. Bowes* (the leading case), 7 Durn. & East, 482; S.C. 2 Bos. & Pul. 500, S. P.;

Hughes v. Turner, 3 Myl. & Kee. 666; *Parker v. Briscoe*, 3 J. B. Moore, 24; *Monypenny v. Bristow*, 2 Russ. & My. 117; *Smith v. Dearer*, 3 You. & J. 278; compare with *Williams v. Goodtitle*, 10 B. & C. 895, and the most recent case of *Ashley v. Waugh*, Dec. 10 & 11, 1839, 4 Jurist, 572.—Ed.]

(*s*) [*Coppin v. Fernyhaugh*, 2 Bro. C. C. 291; *Hulme v. Heygate*, 1 Mer. 285; *Williams v. Goodtitle*, 10 B. & C. 895; *Rowley v. Eyton*, 2 Mer. 128, a case in which the principle is pushed to its utmost length.—Ed.]

(*t*) [*Carte v. Carte*, 3 Atk. 180; *Alford v. Earle*, 2 Vern. 209; *Jackson v. Hullock*, 2 Eden, 263.]

(*u*) [*Izard v. Hurst*, 2 Freem. 224;

publication does not revive a lapsed devise or bequest (*x*), nor does it cure a defect of expression in the will (*y*), and it has been doubted whether it brings property comprised in a lapsed specific devise within the residuary devise in the will (*z*).

[If the residuary devise itself has lapsed, of course the republication of the will is inoperative to impart new efficacy to the devise, as well where the lapse affects an aliquot share only of the residue as where it embraces the entirety (*a*).—Ed.]

But a codicil, which concerneth only personal legacies, will not amount to a republication of the will; so as to pass lands purchased after the making of the will (*b*).

If a man deviseth all his lands *for payment of his debts*, and purchaseth lands afterwards, the lord keeper said he would decree a sale, though there were no precedent articles (*c*).

If a man hath a *lease*, and disposeth of it (specifically) by his will, and afterwards surrenders it and takes a new lease, and after dies, the devisee shall not have this last lease, because this was a plain countermand of his will (*d*).

But in the case of *Stirling v. Lydiard*, Nov. 21, 1744 (*e*), where a man devised *all and singular his leasehold estate, goods, chattels and personal estate whatsoever*, and afterwards renewed a lease, it was held by the Lord Chancellor Hardwicke clearly, that the leasehold estate passed by the will. He said the objection against its passing proceeded upon a mistake, that this is *a specific legacy*, but it is nothing like it; for it is only an enumeration of the several particulars of his personal estate, and is a general devise of the whole. It hath no appearance of a revocation. Suppose the testator had purchased a new lease, would not that have passed? Why then should not a new term in a lease equally pass? If I were to construe this a revocation, I do not know but if a man were to give all his Bank, East India, and South Sea stock, and should afterwards turn it into money, it might as well be insisted that this was a revocation.

If a man deviseth a *term for years*, which he hath not at the time of the devise, but purchaseth some time before his death, Holt, C. J., doubted whether this would be good. But Mr. P. Williams says, that notwithstanding the doubt which

Monck v. Lord Monck, 1 Ball. & B. 298; *Booker v. Allen*, 2 Russ. & My. 270; *Powis v. Mansfield*, 3 My. & C. 376; *Holmes v. Coyhil*, 7 Ves. 499.]

(*x*) [*Doe v. Kett*, 4 Durn. & East, 601; see also 2 Ves. sen. 626.]

(*y*) [*Lane v. Wilkinson*, 10 East, 241.]

(*z*) [*Doe v. Sheffield*, 13 East, 526; *Williams v. Goodtitle*, 10 B. & C. 895.]

(*a*) [See Mr. Jarman on Wills, vol. i. p. 186.]

(*b*) 2 Vern. 625.

(*c*) 2 Cha. Ca. 144.

(*d*) Golds. 93; [*S. P. Abney v. Miller*, 2 Atk. 593; *Rudstone v. Anderson* (Lord Eldon), 2 Ves. 418; *Marwood v. Turner*, 3 P. Wms. 163; *Hone v. Midcraft*, 1 Bro. 260; *Langford v. Pitt*, 2 P. Wms. 629, decided that lands contracted for would not pass by the will of the intended publisher unless such contract was binding within the Statute of Frauds. *Vide infra*, "Payment of Legacies."—Ed.]

(*e*) 3 Atk. 199.

the Court of King's Bench seems to have been in, in that case, it hath been clearly held to pass by such a will (*f*).

[But 1 Vict. c. 36, s. 3, makes all wills *speak* from the time of the testator's death, and therefore passes all the estate real or personal to which he may be entitled at the time of his death, though acquired subsequently to the making of his will.—ED.]

By 1 Vict.
c. 36, s. 3,
Will speaks
from Time of
Death.

III. Form and Manner of making a Will, and therein of appointing Guardians and Executors, and of lapsed Legacies, &c.

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Statute of Frauds.

[Before mention is made of the Statute of Fraud, it may be as well to remark, that, with respect to all wills *not made before* the 1st of January, 1838, the 9th section of 1 Vict. c. 26, enacts,

[1. That every will shall be *in writing*.

[2. That it shall be *signed* at the end by the testator, or by some other person *in his presence*, and by his direction.

[3. That such signature shall be *made* or *acknowledged* in the *simultaneous presence* of two witnesses.

[4. That such witnesses shall subscribe the will *in the presence of the testator*. These regulations, as has been said, are applicable only to wills made on and after the 1st of January, 1838.—ED.]

A will may be contingent, as, if the testator do not return from a journey; in which case, if he returns, it is void (*g*).

Contingent
Wills.

[By Lord Hardwicke: The court, however, construe conditions of this kind cautiously and with reference to the particular circumstances of each case, and have held that where a person *subsequently* recognized papers which on the face of them contemplated a particular contingency which *had not* arrived, the papers might still dispose of his property (*h*).—ED.]

Copyholds not being within the statutes of wills and frauds, and passing by the surrender to the uses of the will, and not by the will itself, such uses may be declared by any writing which the ecclesiastical courts will grant probate of (*i*).

Copyholds.

(*f*) 3 P. Wms. 169.

(*g*) *Parsons v. Lanoe*, Amb. 557.

(*h*) [*Strauss v. Schmidt*, 3 Phill. 209; *Ingram v. Strong*, 2 Phill. 294;

Forbes v. Gordon, 3 Phill. 625; *Burton v. Collingwood*, 4 Hagg. 176; *In the goods of Ward*, 4 Hagg. 179.]

(*i*) *Tuffnell v. Page*, 2 Atk. 37;

Statute of
Frauds.

By the 29 Car. 2, c. 3, entitled "An Act for Prevention of Frauds and Perjuries," sect. 5, "All devises and bequests of any lands or tenements, devisable either by force of the Statute of Wills, or by this statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void, and of none effect."

Signature.

Signed.]—Signing being only mentioned, therefore *sealing* is not necessary, although it be expedient to a testament, which is not properly and legally a deed, to which a seal is essential, though it hath the force and virtue of a deed (*j*).

[It has been decided that a mark is sufficient, and in the case where the testator was able to write (*k*).—ED.]

Signed by the Party so devising the same.]—E., 33 Car. 2, *Lemain v. Stanley* (*l*). The testator made his will, and wrote it with his own hand, and began it thus—"I, John Stanley, make this my last will and testament," but did not subscribe his name; yet this was adjudged a good will, and sufficient signing by the testator within the statute, to pass lands, it being subscribed by three witnesses in the presence of the testator; for his name being written in the will, it must be a sufficient signing within the statute, since the statute hath not appropriated any particular place in the will, either top, bottom or margin, for that purpose; and therefore necessarily the testator is at liberty to put it where he pleases.

And it hath been said, that if the devisor only put his seal to the will, without signing it, this is a sufficient signing within the statute, because signing is no more than a mark to distinguish a man's act, and sealing is a sufficient mark to know it to be his will (*m*).

And in *Warneford v. Warneford*, E., 13 Geo. 1, on an issue directed out of chancery, Raymond, Chief Justice, ruled, that sealing a will is signing within the statute (*n*).

But in the case of *Smith v. Evans*, in the exchequer, Dec. 6, 1751 (*o*), it was said by the Lord Chief Baron Parker, Baron Clive, and Baron Smythe (Baron Legge being absent), that what is said by North, Windham, and Charleton, in 3

Att.-Gen. v. Sawtell, *ibid.* 497; *Same* & El. 94.]

v. Andrews, 1 Ves. 225; *Carey v. Askew*, 2 Bro. C. C. 59; [*Doe d. Cook v. Danvers*, 7 East, 298; *Noel v. Hay*, 5 Mad. Q. R. 38; *Spring d. Titcher v. Biles*, 1 T. R. 435 n.]

(*j*) God. O. L. 6; Wentw. 29.

(*k*) [*Taylor v. Dening*, 3 Nev. & Per. 228, and the same case under the names of *Baker v. Dening*, 8 Ad.

(*l*) 3 Lev. 1; [*Hilton v. King*, 3 Lev. 86; 2 Ves. jun. 248; *Winsor v. Pratt*, 2 Brod. & Bing. 650; *Cook v. Parsons*, 2 Vern. Rep. 459.]

(*m*) Gilb. 93; [*Lemayne v. Stanley*, 3 Lev. 1.]

(*n*) Str. 764.

(*o*) 1 Wils. 313. [See remarks of Willes J., 1 Ves. jun. 13.]

Lev. 1, that putting a seal to a will is sufficient signing within the statute, is very strange doctrine; for that if it were so, it would be very easy for one person to forge any man's will, by only forging the names of any two obscure persons dead; for he would have no occasion to forge the testator's hand. And the barons said, if the same thing should come in question again, they should not hold that sealing a will only was a sufficient signing within the statute.

Signature.

And in the case of *Grayson v. Atkinson*, July 17, 1752, in the chancery, Lord Hardwicke said, that he should have much doubted upon that point; for the statute, requiring the will to be signed, undoubtedly meant some evidence to arise from the handwriting; then how can it be said, that putting a seal to it would be a sufficient signing? For any one may put a seal; no particular evidence arises from that seal; common seals are alike, and one man's may be like another's: no certainty or guard therefore arises from thence. And where an act of parliament mentions signing, it means something different from sealing (p). [In fact, the doctrine as to the sufficiency of sealing alone (q) is to be considered as completely overruled (r).—ED.]

Sealing.

[The name must be inserted so as to give authenticity to the whole instrument (s). Where a testator had signed only two sheets of his will, being prevented by sickness from signing the remaining sheets, Lord Mansfield held the will not executed (t).—ED.]

H., 1728, *Dormer v. Thurland* (u). The will was not signed by the testator in the presence of the witnesses; but he acknowledged it to be his hand, and declared it to be his will, in their presence; and they subscribed their names in his presence. Lord Chancellor King inclined that the will was good; but ordered the point to be reserved, and made a case of for further consideration.

And in the case of *Stonehouse v. Evelyn*, E., 1734 (x), a will was held to be good, though all the witnesses did not see the testator sign it, but he owned it before them to be his hand. And the reporter says, that on his mentioning this case to Mr. Justice Fortescue Aland, he said, that this was the common practice; and that it is sufficient, if one of the three subscribing witnesses swears that the testator acknowledged the signing to be his own handwriting. And it is remarkable, that the statute of frauds doth not say the testator shall sign his will in the presence of three witnesses, but

(p) 2 Vesey, 459. [See also *Ellis v. Smith*, 1 Ves. jun. 11; *Harrison v. Harrison*, 8 Ves. 185; *Abdy v. Grix*, 8 Ves. 594; *Wright v. Wakeford*, 17 Ves. 459.]
 (q) [*Lemayne v. Stanley*, 3 Lev. 1.]
 (r) [The last case is *Wright v. Wakeford*, 17 Ves. 458, per Lord Eldon.]
 (s) [*Stokdale v. Moore*, 1 P. W. 771.]
 (t) [*Right v. Price*, Doug. 241, by Lord Mansfield.]
 (u) 2 P. Will. 506.
 (x) 3 P. Will. 254.

requires these three things; first, that the will should be in writing; secondly, that it should be signed by the testator; and, thirdly, that it should be subscribed by three witnesses in the presence of the testator.

And in the said case of *Grayson v. Atkinson*, July 17, 1752(y), by the lord chancellor, Hardwicke. At the time of making the act, and ever since, if a bond or deed is executed by the person who signs it, afterwards the witnesses are called in, and before those witnesses he acknowledges that to be his hand; that is always considered as an evidence of signing by the person executing, and is an attestation of it by them. It is true there is some difference between the case of a deed and a will in this respect, because signing is not necessary to a deed, but sealing is; and I do not know that it was ever held, that acknowledging his sealing without witnesses has been sufficient. But notwithstanding, that is the rule of evidence relating to signing. If it was in the case of a note, or declaration of trust, or any other instrument not requiring the solemnities of a deed, but bare signing; if that instrument is attested by witnesses, proving that they were called in, and that he took that instrument, and said, that was his hand, that would be a sufficient attestation of signing by him. That is the rule of evidence; and there is nothing in this act to take it out of the general rule. [There has long ceased to be any doubt as to the acknowledgment of a signature before witnesses being sufficient(z). An acknowledgment of the testator before all the witnesses is effectual; a necessary consequence of the principle, that signing before some, and acknowledging before the rest of witnesses, was effectual(a). No particular form of words in attestation is essential. It is presumed that the witnesses subscribed in the presence of the testator, unless the validity of the will be disputed, when it must be proved by oral testimony(b). After the death of witnesses, a compliance with the requisitions of the statute will be generally presumed(c).—ED.]

Attestation
and Sub-
scription.

Attested and subscribed in the presence of the said Devisor.] It hath been ruled in equity, that a will of lands, attested by three witnesses, who subscribed their names at the request of the testator, though at several times, is a good will, though the witnesses were never once present together(d).

(y) 2 Vesey, 457.

(z) [See cases in note, 2 Ves. sen. 245. See also *Ellis v. Smith*, 1 Ves. jun. 11 (Lord Hardwicke); *Addy v. Grix*, 8 Vesey, 504; *Warbeech v. Kennedy*, 1 Ves. & B. 362; *Wright v. Wright*, 5 Moo. & Pay. 316. The case of *Smith v. Codron* (by Sir J. Jekyll), 2 Ves. sen. 455, is said to have first set the question at rest.—ED.]

(a) [*Ellis v. Smith*, 1 Ves. jun. 11;

Lord Harkwicke, &c.]

(b) [*Hinds v. Jones*, Comyn, 531; *Croft v. Powlett*, 2 Stra. 1109; S. C. 8 Vin. Ab. 128, pl. 14; *Price v. Smith*, Willes, 1; *Lord Rancliffe v. Lady Parkins*, 6 Dow, 202]

(c) [*Heads v. James*, Comyn, 531; *Crofts v. Powlett*, 2 Str. 1109.]

(d) *Gilb.* 92; *Vin. Devise*, N. 10, 12.

Feb. 1, 1742, *Jones v. Lake* (e). A special verdict was found upon an ejectment; the case was, the testator signed and executed his will in December, 1735, in the presence of two witnesses, who attested the same in his presence; afterwards, in the year 1739, he with his pen went over his name, in the presence of a third witness, who subscribed his name in the testator's presence, and at his request. And the question was, whether this was a due execution within the statute. For the heir at law it was argued, that the statute requiring three witnesses to subscribe in the testator's presence, must intend they should be all present together; otherwise there is not that degree of evidence which the statute requires: for an attestation of three witnesses at different times, has only the weight of one witness. Witnesses to a will not only attest the due execution of the will, but likewise the capacity of the testator at the time of execution. A man may be sane at the time two witnesses attest, and insane when the third attests. It cannot be considered as a will, till the third witness hath signed, for that completes the act. The will here is dated in 1735; suppose lands purchased after the date, and before the attestation by the third witness, will the lands pass? certainly not. On the other hand it was argued for the devisee, that a will executed before three witnesses, though at three different times, is good; the statute not requiring they should all be present at the same time. The requisites under the statute are, that the testator should sign in the presence of three witnesses at least, and that they should attest in his presence. It would therefore be adding new requisites which the act does not mention, and in effect be making a new law. By the Lord C. J. Lee: This case depends upon the words of the statute. The requisites in the statute are, that three witnesses should attest his signing, but it doth not direct that the three witnesses should be all present at the same time. Here you have the oath of three attesting witnesses. This is the degree of evidence required by the statute. And the same credit is given to three persons at different times, as at the same time. We cannot carry the requisites farther than the statute directs. The act is silent as to this particular. It would therefore be making a new requisite. The signing is the same act reiterated. The testator went over his name again, and declared it to be his last will. And judgment was given against the heir at law.

May be at
different
Times.

E., 31 Geo. 2, *Carleton on the demise of Griffin v. Griffin* (f). On a special verdict it was stated, that John Griffin, on the 2d of May, 1752, wrote upon a sheet of paper with his own hand, as follows: "Know all men by these presents, that I, John Griffin, make the aftermentioned my last will and testament;" and therein he made several dispositions of his real

(e) 2 Atkyns, 176.

(f) Burrow, Mansf. 549.

Will may be made at different Times, and the whole authenticated at one Time.

and personal estate; and subscribed it at the same time when he wrote it; but there was no seal or witness to it. And on the 5th of January, 1754, he wrote on the same sheet of paper, "Memorandum, whereas I have laid out on a lighter [and so on]—all these, at my death, shall be at my wife's disposal. And this not to disannul any of the former part made by me the 2d of May, 1752. Witness my hand, John Griffin." All this latter writing related only to the personal estate; and he subscribed it in the presence of three witnesses; and then he took the said sheet of paper in his hand, and declared it to be his last will and testament, in the presence of the said three witnesses; and then delivered it to them, and desired they would attest and subscribe it in his presence, and in the presence of each other; which they accordingly did. Upon this special case, one question reserved for the opinion of the court was, whether the republication of the said first will (made in 1752) upon the 5th of January, 1754, be a publication or republication of his first will within the statute. It was argued, that this was no good will to pass lands, beyond all doubt, till the 5th of January, 1754; and what happened then, was neither a publication, nor a republication sufficient to make it a good will within the statute. Here are two distinct instruments, at two different times; the first unattested, relating to the real estate; the second, signed, published, and attested according to the statute, relating to the personal. But the first was originally bad, and could not be made good by the subsequent transaction. By Lord Mansfield and the court: The case is accurately stated; for it is not stated to be either a will or a codicil, but a sheet of paper written. It is a will of an illiterate man, drawn by himself. At first, in 1752, the testator did not know that any witnesses were necessary. In 1754, he had found that they were necessary. Then he makes a subsequent disposition: which is a memorandum to be added to it. But he doth not call this a codicil; nor doth the case state it to be so. He plainly considers the whole as one entire disposition; and he expressly declares in the latter, that he doth not thereby mean to disannul any part of his former devise or disposition. There is not a tittle in the latter that relates to the real estate; therefore the only intent of having the three witnesses, was and must be to authenticate the former. The signing the former does no harm; it makes it more solemn, but doth not hurt it. Then the publication of it is, as of a will. He takes up the sheet of paper; and holding up the said sheet of paper, says, It is my will. And certainly, he did not mean a part of it only, but the whole of it. And he desires them to attest it. All this must relate to the whole that was written on this paper. It must be considered as one entire will, made at different times, and attested agree-

ably to the statute. And a man is not obliged to make his whole will all at the same time.

— And *per* Lord Mansfield, in *Bond v. Seawell* (g): It is not necessary that the witnesses should attest in the presence of each other, or that the testator should declare the instrument executed “to be his will,” or that the witnesses should attest every page, folio, or sheet, or that they should know the contents, or that each folio, page, or sheet should be particularly shown to them. But in that case, there being some doubt, whether the first sheet was or was not in the room at the time of executing and attesting the last, a new trial was directed.

[The presumption that the testator intended to execute all the papers, is not so strong when they consist of a will and a codicil or of two separate codicils (h).

[It has been repeatedly held, that the attestation of a codicil applies to a previous unattested will under the statute of frauds, for the devise of freehold, where both the attested and unattested instruments were written on the same paper (i). In the cases cited in the note the attested codicil referred to the unattested document; but this is not essential where both are written on *the same sheet* of paper (j), but where they are on *different* sheets, as in *Casleton v. Griffin*.

[It may be as well to remark here that a second duly attested codicil has been held to establish a previous attested will and a previous unattested codicil (k). *Vide ante*, the doctrine of republication; but a testator cannot by his will empower himself to dispose by an unattested codicil (l).—ED.]

If the testator show the will unto the witnesses, saying, “This is my last will and testament,” or “Herein is contained my last will;” this is sufficient, without making the witnesses privy to the contents thereof, provided the witnesses be able to prove the identity of the writing, that is to say, that the writing now showed is the very same writing which the testator in his lifetime affirmed before them to be his will, or to contain his last will and testament (n).

Whether it is necessary that the testator should declare to the witnesses, at the time of the attestation, that the writing

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(g) 3 Bur. 1775.

(h) [*Lea v. Libb*, Carth. 35; *Bond v. Seawell*, 3 Burr. 1775.]

(i) [*De Bathe v. Lord Fingall*, 16 Ves. 167; *Doe d. Williams v. Evans*, 1 Comp. & Meeson, 42.]

(j) [See also *Guest v. Willasey*, 12 J. B. Moore, 2; *Utterton v. Robins*, 2 Ad. & Ell. All these authorities seem to overthrow *Att.-Gen. v. Baines*, Pre. Ch. 270; S. C. 3 Ch. Rep. 150.]

(k) [*Crosbie v. Macdowall*, 4 Ves.

610; *Gordon v. Lord Reay*, 5 Sim. 274, Sir L. Shadwell. As to when a reference to extrinsic documents is allowable, see *Habergham v. Vincent*, 2 Ves. jun. 204; *Molineux v. Molineux*, Cro. Jac. 144; *Dillon v. Harris*, 4 Bligh, N. S. 329; Jarman on Wills, p. 83.]

(l) [*Whytall v. Kay*, 2 Myl. & Kee. 765; and *vide post*, on Revocation.]

(m) See farther on this head, *ante*.

(n) Swin. 52; God. O. L. 66.

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which they attest is his will, hath been matter of some doubt. As in the case of *Wallis v. Wallis*, T., 1762: Thomas Wallis, Esquire, made his will, and therein devised his real estate to his wife for life; the will was of his own hand-writing; and the form of attestation was in these words: "Signed, sealed, published, and declared for the last will and testament of the said Thomas Wallis, in the presence of us, &c. Isabella Matthews, James Wardell, William Powell." The heir at law brought an ejectment. The widow pleaded the devise to her for life. The cause came on to be heard at the summer assizes at Lincoln, 1762, by a special jury, before Mr. Justice Denison. To prove the execution of the will, the defendant produced William Powell, the testator's coachman, one of the three subscribing witnesses, who deposed, that in the beginning of July, 1760, James Wardell, then butler to the said Thomas Wallis, came and told him the said Powell that he was to come to his master; that upon entering the room, he found his master sitting with a table before him, on which were some papers open; and that his master called him, and the said Wardell, and one Isabella Matthews, then his housekeeper, up to the table to him; where they all came. Then the said Thomas Wallis, further addressing himself to them all, desired them to take notice; and then took a pen, and in all their presence signed and sealed each part of his will, and laid both the said parts open and unfolded before them to subscribe their names as witnesses thereto; which they all did, by the direction of the said Thomas Wallis in his presence, and in the presence of each other; he showing them severally where to write their names. But that the said Thomas Wallis, otherwise than as above, did not declare or publish either part to be his will, or say what it was. The counsel for the plaintiff contended that this was not a sufficient proof by one witness, of a complete execution of the will. And they produced on the other hand, the other two subscribing witnesses; who in divers particulars did not give a clear and distinct evidence; and could not recollect whether they had signed one or two papers; or whether then, or at any time before the said Thomas Wallis's death, they understood what they had so witnessed to be the said Thomas Wallis's will, though Wardell seemed to admit he conjectured it so to be. But both Wardell and Matthews swore that they did not see the said Thomas Wallis sign or seal either part of his said will; that Powell, the other subscribing witness, was not at that time in the room, when (at the said Thomas Wallis's desire) they wrote their names to the two papers as they now appear; that the said Thomas Wallis did not declare or publish it as his will, nor did they know it to be a will. The defendant's counsel then called Richard Price, the said Thomas Wallis's groom, who swore, that one morning in the beginning of July, 1760, James War-

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dell told him that his master had much wanted him; and that upon his the said Price's offering to go to his master to receive his orders, the said Wardell told Price that the business was done, and that Powell had supplied his place; and that he the said William Powell, James Wardell, and Isabella Matthews, had that morning been witnessing their master's will. And Sarah Dixon being called, swore, that in the beginning of July, 1760, Isabella Matthews came one morning after breakfast into the kitchen, and told her that she the said Matthews, James Wardell, and William Powell, had that morning witnessed their master's the said Thomas Wallis's will, though he had not told them it was so. Upon this state of the evidence on both sides, it was insisted for the plaintiff, that as the law stood before the statute of frauds, *publication* of a will was an essential part thereof; and if so, there is nothing in that statute to take it away. And further it was insisted, that by the said statute there are four requisites to constitute a good and valid devise of lands: 1. That it shall be in writing; 2. That it shall be signed by the party devising, or by some other person in his presence, and by his express directions; 3. That it shall be attested and subscribed in the presence of the devisor by three or four credible witnesses; 4. That the words *attested and subscribed* must import, that it shall be published as a devise or will by the testator in the presence of the said witnesses. On the contrary, for the defendant it was insisted, that neither before nor since the statute publication was necessary; and that by the statute, only the three first requisites are necessary, which in the present case were all complied with, the devise being in writing, and signed by the testator in the presence of three credible witnesses, who had subscribed their names as witnesses to the same in the presence of the testator and of each other; and further, supposing any such publication was necessary, that the testator had used words and done acts which amounted to a publication within the meaning of the statute, which had not directed or prescribed any particular form or manner in which such publication should be made; that the testator using these significant words to all the witnesses when he called them up to the table, "*take notice*," and then signing both parts of his will, and then delivering both the parts thereof to the witnesses to attest, directing them where to sign their names, and to witness each part under the common and usual form of attestation, which the witnesses did, was a sufficient execution and publication of his will; that the words "*signed, sealed, published, and declared*," being all written in the testator's own handwriting, and the witness Powell swearing that both the parts of the will lay open to the inspection of all the witnesses when they subscribed their names, and it appearing by the evidence of Price and Dixon that both the other witnesses had declared

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that they had been attesting the said Thomas Wallis's will, this was much stronger than the case of *Peate v. Ougley*, reported in Comyns, 197. And Mr. Justice Denison was of opinion, if the witnesses for the defendant were credited by the jury, that this was a due execution within the statute, and a sufficient publication; and for this cited the case of *Trimmer v. Jackson*, lately determined in the Court of King's Bench. And the jury found accordingly a verdict for Mrs. Wallis, the defendant. Nevertheless, the plaintiff's counsel insisted, that the point, whether a good publication or not, should be reserved for a case to be argued above. But the matter was compromised, on the defendant's remitting the costs.

Note.—The case of *Peate v. Ougley* was, where the testator produced to the witnesses a paper folded up, and desired them to set their hands to it as witnesses, which they all did in his presence, but they did not see any of the writing, nor did he tell them it was his will, or say what it was; but it was all written by the testator's own hand. It was objected, that this was not a good execution of the will within the statute; for it is not sufficient that the witnesses write their names in the presence of the testator, without any thing more; but they must attest every thing, to wit, the signing of the testator, or at least the publication of his will: But here the testator neither signed the will in their presence, nor declared it to be his last will before them. On the other part, it was insisted, that the execution was sufficient within the statute; for there is no necessity that the witnesses see the testator write his name; and if he writes these words, *signed, sealed, and published* as his will, and prays the witnesses to subscribe their names to that, it will be a sufficient publication of his will, though the witnesses do not hear him declare it to be his will. And Trevor, C. J., inclined, that here was sufficient evidence of the execution, and the jury found it accordingly. But as to the matter of law, he permitted it to be found special. And it doth not appear further what became of it.

The case of *Trimmer v. Jackson* was, where the witnesses were deceived by the testator at the time of the execution, and were led to believe, from the words used by the testator at the execution of the instrument, that it was a deed and not a will. It was delivered as his act and deed; and the words "*sealed and delivered*" were put above the place where the witnesses were to subscribe their names. And it was adjudged by the court, as it is said, for the inconveniences that might arise in families, from having it known that a person had made his will, that this was a sufficient execution (o).

Witnesses
may be per-
fectly igno-
rant of Con-
tents of Will.

[It has been recently held, however, that where a testator having previously signed, merely requested the witnesses to

(o) See also Lord Hardwicke's opinion in *Rigden v. Valier*, 2 Ves. 252, et *infra*.

subscribe the memorandum of attestation, though they neither saw his signature, nor were made acquainted with the nature of the instrument they attested, the will was duly executed according to the statute (*p*).

[A mark has been held to be a sufficient attestation under the statute (*q*), and even where the testator was able to write (*r*).

What is sufficient Attestation.

In the Presence of the said Devisor.]—E., 3 Jac. 2, *Shires v. Glasscock* (*s*). The question was, whether the will was made according to the statute; for the testator had desired the witnesses to go into another room seven yards distant to attest it, in which there was a window broken, through which the testator might see them. By the court: "The statute requireth attestation in his presence to prevent obtruding another will in the place of the true one; it is enough if the testator might see; it is not necessary that he should actually see them signing; for at that rate if a man should but turn his back or look off, it would vitiate the will. Here the signing was in the view of the testator, he might have seen it, and that is enough. So if the testator being sick, should be in bed, and the curtain drawn."

In the presence of Devisor.

But if the witnesses subscribe their names to the will in a room adjoining to that where the testator lay, but out of his sight, so as he could not see them subscribe their names; this is no good will within the statute to pass lands, because the witnesses in that case did not subscribe their names in the testator's presence (*t*).

But it is not necessary *that it appear upon the face of the will* to have been signed in the presence of the devisor. As in the case of *Hands v. James*, E., 9 Geo. 2 (*u*). In ejectment brought by the plaintiff as heir at law, the question was on a case by consent left to the opinion of the court, whether it should be left to a jury to determine whether the witnesses to a will (being all dead) did set their names in the presence of the testator, and this merely upon circumstances without any positive proof. By the court: "This is a matter fit to be left to the jury. The witnesses by the statute ought to set their names as witnesses in the presence of the testator; but it is not required by the statute that this should be taken notice of

(*p*) [See the cases of *British Museum v. White*, 3 M. & Pay. 689; S. C. 6 Bing. 310; (*Tindal*, Ch. Jus.) *Wright v. Wright*, 5 M. & P. 316; S. C. 7 Bing. 457; *Johnson v. Johnson*, 1 Crompt. & Mees. 140.]

(*q*) [*Harrison v. Harrison*, 8 Ves. 185; *Addy v. Grix*, 8 Ves. 504.]

(*r*) [*Lemayne v. Stanley*, 3 Lev. 1.]

(*s*) 2 Salk. 688; S. P. *Casson v. Dade*, 1 Bro. C. C. 99; [*Davy v.*

Smith, 3 Salk. 395.

(*t*) Gilb. 93. [*Longford v. Eyre*, M. 1721; 1 P. Wms. 740; *Broderick v. Broderick*, 1 P. Wms. 239; *Mackell v. Temple*, 2 Show. R. 288; *Carter v. Price*, Dougl. 241; *Hands v. James*, Com. R. 531; *Onions v. Tyrer*, 2 Vern. Rep. 741; *Doe d. Wright v. Manifold* (by Lord Ellenborough), 1 M. & S. 294.]

(*u*) Comyn, 531.

in the subscription to the will ; and whether inserted or not, it must be proved ; if inserted, it doth not conclude, but the contrary may be proved : and if not conclusive when inserted, the omission thereof shall not conclude that it was not so ; and therefore it must be proved by the best proof that the nature of the thing will admit of."

And in the case of *Croft v. Pawlet*, E., 12 Geo. 2 (x), upon a trial at bar concerning the execution of a will, it did not appear upon the face of it that the attestation of the witnesses was made in the presence of the testator, which being objected to, a case was cited, where Lord Chief Justice Eyre held it a matter proper to be left to a jury, whether they believed it to be so done or not. And Mr. Justice Chappel cited a case to the same purpose ; to which the court assented : and they held it not to be necessary to be inserted in the will that the attestation was in the presence of the testator, though by the statute it is necessary that it should in fact be so attested.

[It is immaterial whether the witnesses were absent at the request or for the convenience of the testator or not (y).—ED.]

Three or
Four credible
Witnesses.

By Three or Four credible Witnesses.]—M., 1 Will. 3, *Lee v. Libb* (z). The testator made his will in writing, subscribed by two witnesses, and therein devised his lands. Afterwards he made a codicil, in which his will was recited ; and this also was attested by two witnesses, one of which witnesses was a witness to the will, but the other was a new witness. The question was, whether this new witness should make a third to the will. And it was adjudged that he should not : it is true here are three witnesses to the intent and will of the testator ; but there are only two to his will in writing : it is true likewise that there are two witnesses to the codicil ; but those are not witnesses to the written will : so that there wants one witness to the will in writing.

In the case of *Tuffnell v. Page*, E., 1740 (a), it was held clearly by Lord Harkwicke, that a will of a copyhold tenant, attested by one or two witnesses, or even without any witness at all, is sufficient to declare the uses of a surrender which he has made ; and the reason is, because the party is in by the surrender, and not by the will.

Therefore where there is a general devise of lands, and there is no surrender of the copyhold lands to the use of the will, the construction at law is, that they do not pass by the will ; for copyhold lands are not properly the subject of a devise, as they pass not by the will but by the surrender (b).

Credible
Witnesses.

Credible Witnesses.]—M., 34 Car. 3, *Hudson's case* (c). Two witnesses swore that the testator did not publish it as his

(x) Vin. Devise, (N 9).

(y) [*Broderick v. Broderick*, 1 P. W. 23 ; *Machell v. Temple*, 2 Show. 28.]

(z) 3 Salk. 395.

(a) Barnard's Cha. Ca. 12.

(b) 1 Atk. 388.

(c) Skin. 79.

will, but that another guided his hand, and that the testator made his mark, but said nothing, nor was he capable. On the other side it was proved how that the testator had made two former wills, and in them had devised his land in the like manner as by this will, and that he died of a consumption, and was sensible to the last; and how that three days after making his last will he was sensible and able to discourse, and so continued till within six days of his death; hereupon it appeared that the witnesses had been dealt with. To which the counsel on the other side urged, that if the witnesses were not to be believed, then there would not be three witnesses to the will, and so no will within the statute. To which Pemberton, Chief Justice, answered, that if there were three witnesses to a will, whereof one was a thief or person not credible, yet the words of the statute being satisfied, and he having collateral proof to fortify the will, he would direct a jury to find it a good will; and as to this case, he said it was not probable that a person in his senses (as they are not able to disprove him to be) would suffer another to guide his hand to a writing, and not say any thing, and that therefore they took it he did publish it: and he remembered *Digge's case*, where the scrivener wrote the will, and two others were witnesses, the scrivener swore the testator was *compos*, and the two other swore he was not *compos*; the court stopped these two from going away till verdict was brought in, which found the will a good will, and then committed the two witnesses to the Fleet; for if this was suffered, it would be in any man's power to destroy another's will. So likewise did the court here commit the witnesses, and took security of the plaintiff to prosecute them for perjury.

Credible
Witnesses.

And in the case of *Alexander v. Clayton*, E., 8 Geo. 3 (d), where a woman had sworn against her own attestation, Mr. Justice Yates said, she ought not to have been admitted to give this evidence. And Lord Mansfield observed, that it is of terrible consequence that witnesses to wills should be tampered with to deny their own attestation; but he said that will not invalidate the will; for there are cases where one witness hath supported a will, by swearing that the other two attested, though those have denied that they did so.

And in the case of *Lowe v. Joliffe*, E., 2 Geo. 3 (e), on a trial at bar, on an issue out of chancery concerning lands in Worcestershire, the three subscribing witnesses to the testator's will, and the two surviving witnesses to a codicil made four years subsequent to the will, and a dozen servants of the testator, all unanimously swore him to be utterly incapable of making a will, or transacting any other business, at the time of making the supposed will and codicil, or at any intermediate time. To encounter this evidence, the counsel for the

(d) Bur. Mansf. 2224.

(e) Bla. Rep. 365, 416.

Credible
Witnesses.

plaintiff examined several of the nobility and principal gentry of the county of Worcester, who frequently and familiarly conversed with Mr. Jolliffe, the testator, during that whole period, and some on the day whereon the will was made, and also two eminent physicians, who occasionally attended him, and who all strongly deposed to his entire sanity, and more than ordinary intellectual vigour. They also examined to the like purpose the attorney, a person of unblemished reputation, who drew the will, and read the deposition of the attorney who drew and witnessed the codicil, who was dead, but his testimony was perpetuated in chancery, who spoke very circumstantially to the very sound understanding of the testator, and his prudent and cautious conduct in directing the contents of his codicil. Upon the whole it appeared to be a very black conspiracy to set aside the will, without any foundation whatsoever; the defendant's witnesses being so materially contradicted, and some of them so contradicting themselves, that the jury, after a trial of fifteen hours, brought in a verdict for the plaintiff, to establish the validity of the will and codicil, after an absence of five minutes. Lord Mansfield then declared himself fully persuaded that all the defendant's witnesses, except one, being nineteen in number, were grossly and wilfully perjured; and called for the subscribing witnesses, in order to have committed them in court, but they had withdrawn themselves. However, a prosecution of some of them for perjury was strongly recommended by the court; and the three testamentary witnesses were afterwards convicted, and sentenced, each of them to be imprisoned for six months, to stand twice in the pillory, with a paper on their heads denoting their crime, once at Westminster Hall Gate and once at Charing Cross, and to be transported for seven years.

In 1 Ld. Raym. 85, it is said *that if the spiritual court refuse the evidence of the son to prove a will in which the father is a legatee, no prohibition is grantable.* And before the Delegates, there were three witnesses to prove a nuncupative will; two of them were without exception, and the third was son to the legatee: the statute of frauds requires three competent witnesses; the question therefore was, whether these three were sufficient, *the son not being an evidence by the spiritual law*; and adjudged that they were, because two only were required by the spiritual law, and the third was a good witness within the intent of the act of frauds.

And although it was a general rule in the Roman law, that no one should be permitted to bear testimony in his own cause, yet legataries were allowed to give evidence upon this distinction, that they were particular and not universal successors; and that a testament would be valid without legataries. The difficulty also which must frequently have occurred in obtaining so great a number of witnesses as seven, might probably induce

the Romans to be less strict as to the persons whom they admitted upon this occasion. But by the practice of the ecclesiastical courts of this kingdom, which have the sole cognizance of the validity of all wills as far as they relate to personal estate, no legatee, who is a subscribing witness to the will by which he is benefited, can be admitted to give his testimony *in foro contradictorio* as to the validity of that will, till either the value of his legacy hath been paid to him, or he hath renounced it; and in case of payment, the executor of the supposed will must release all title to any future claim upon such supposed legatee, who might otherwise be obliged to refund, if the will should be set aside; and a release in this case is always made to the intent that the legatee may have no shadow of interest at the time of making his deposition. The same practice also prevailed at common law, in regard to witnesses who were benefited under wills disposing of real estate. And if a legatee, who was a witness to a will, had refused either to renounce his legacy or to be paid a sum of money in lieu of it, he could not have been compelled by law to divest himself of his interest; and whilst his interest continued, his testimony was useless. And this was determined in the case of *Anstey v. Dowsing*, E., 19 Geo. 2, which was thus: James Thompson, esquire, made his will, by which he disposed of his real estate, and gave to one John Hailes and his wife 10*l.* each for mourning, and an annuity of 20*l.* to Elizabeth Hailes, the wife of John. This will of James Thompson was regularly attested, as the statute directs, by three witnesses, of which number the above-named John Hailes was one; and he refused to be paid 20*l.* in lieu of his wife's legacy and his own. The cause was thrice argued at the bar, and the judges of the King's Bench were unanimously of opinion that a right to devise lands is not a common law right, but depends upon powers given by statutes, the particulars of which are, that a will of lands must be in writing, signed and attested by three credible witnesses in the presence of the deviser: that these were checks to prevent men from being imposed upon, and certainly meant that the witnesses to a will (who are required to be credible) should not be persons who are entitled to any benefit under that will; and that therefore John Hailes was not a good witness (*f*). But this very singular case, and the unanimous opinion of the judges upon the meaning and intent of the statute of frauds and perjuries, gave rise to the act of parliament here following (*g*).

Credible
Witnesses.

Which act is that of the 25 Geo. 2, c. 6, s. 1, and runs thus: "Whereas some doubts have arisen on the act for prevention of frauds and perjuries, who shall be deemed legal witnesses within the intent of the said act, it is enacted, that if any person shall attest the execution of any will or codicil

Who shall be
legal Wit-
nesses by 25
Geo. 2, c. 6.

(*f*) Str. 1254.

(*g*) Harr. Justin. B. 2, p. 49, 50.
[*Vide ante*, p. 90.]

Who shall be
legal Wit-
nesses by 25
Geo. 2, c. 6.

which shall be made after June 24, 1752, to whom any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges on lands, tenements, or hereditaments, for payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment, shall, so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such will or codicil within the intent of the said act, notwithstanding such devise, legacy, estate, interest, gift, or appointment, mentioned in such will or codicil."

Sect. 2. "And in case by any will or codicil any lands, tenements, or hereditaments, are or shall be charged with any debt or debts, and any creditor whose debt is so charged hath attested or shall attest the execution of such will or codicil, every such creditor, notwithstanding such charge, shall be admitted as a witness to the execution of such will or codicil within the intent of the said act."

Sects. 3, 4, 5, relate to wills made before the 4th of June, 1752.

Sect. 6. "Provided always, that the credit of every such witness so attesting the execution of any such will or codicil, in any of the cases in this act before mentioned, and all circumstances relating thereto, shall be subject to the consideration and determination of the court and the jury before whom any such witness shall be examined or his testimony or attestation made use of; or of the court of equity, in which the testimony or attestation of any such witness shall be made use of; in like manner to all intents and purposes as the credit of witnesses in all other cases ought to be considered of and determined."

Sect. 7. "And no person to whom any beneficial estate, interest, gift, or appointment, shall be given or made, which is hereby enacted to be null and void as aforesaid, or who shall have refused to receive any such legacy or bequest, on tender made as aforesaid, and who shall have been examined as a witness concerning the execution of such will or codicil, shall, after he shall have been so examined, demand to take possession of, or receive any profits or benefit of or from any such estate, interest, gift, or appointment, so given or made to him in or by any such will or codicil, or demand, receive, or accept any such legacy or bequest, or any satisfaction or compensation for the same, in any manner or under any colour or pretence whatsoever."

Sect. 8. "Provided, that nothing herein shall extend to the case of any heir at law, or of any devisee in a prior will or codicil of the same testator, executed and attested according to the said recited act, or any person claiming under them respectively who has been in quiet possession for the space of

two years next preceding the 6th day of May, 1751, as to such lands, tenements, and hereditaments, whereof he has been in quiet possession as aforesaid, nor to any will or codicil the validity or due execution whereof hath been contested in any suit in law or equity commenced by the heir of such devisor, or the devisee in any such prior will or codicil, for recovering the lands, tenements, or hereditaments mentioned to be devised in any will or codicil so contested, or any part thereof, or for obtaining any other judgment or decree relative thereto, on or before the 6th day of May, 1751, and which has been already determined in favour of such heir at law or devisee in such prior will or codicil, or any person claiming under them respectively, or which is still depending, and has been prosecuted with due diligence; but the validity of every such will or codicil, and the competency of the witnesses thereto, shall be adjudged and determined in the same manner, to all intents and purposes, as if this act had never been made."

Who shall be legal Witnesses by 25 Geo. 2, c. 6.

Sect. 9. " Provided, nevertheless, that no possession of any heir at law or devisee in such prior will or codicil as aforesaid, or of any person claiming under them respectively, which is consistent with or may be warranted by or under any will or codicil attested according to the true intent and meaning of this act, or where the estate descended or might have descended to such heir at law, till a future or executory devise, by virtue of any will or codicil attested according to this act, should or might take effect, shall be deemed to be a possession within the intent and meaning of the clause herein last before contained."

[Three points have been decided on this statute. 1. That it extended to persons beneficially interested exclusively, and not to devisee or executor in trust (*h*). 2. That it applied to a witness who took a direct and not a consequential interest under the will (*i*). 3. That it did not apply to personal estate (*k*).—ED.]

Afterwards this matter came in consideration again, in the case of *Wyndham v. Chetwynd*, M., 31 Geo. 2, which was on an issue out of Chancery, *devisavit vel non*, to try the validity of the will of one Mr. Chetwynd, deceased. The jury found a special verdict with regard to the attestation of this will; wherein it was stated that the testator died March 17th, 1750, leaving the will in question, which was regularly attested by three subscribing witnesses, Higden, Squire, and Baxter; that the testator was indebted about 18,000*l.* upon mortgage of his real estate, and left a personal estate to the amount of 13,972*l.*, which was greatly superior to all his specialty and simple con-

The Case of *Wyndham v. Chetwynd*.

Who are credible Witnesses.

(*h*) [*Batteson v. Bromley*, 12 East, 589.]
 250; [*Phipps v. Pitcher*, 6 Taunt. 220; and *Jarmyn on Wills*, 65.]
 (*i*) [*Hatfield v. Thorpe*, 5 B. & Al. 436; [*Emanuel v. Constable*, 3 Russ. 58, *n.*;
 (*k*) [*Brett v. Brett*, 1 Hagg. 58, *n.*; *Foster v. Banbury*, 3 Sim. 40.]

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tract debts; that he charged his real estate with the payment of his debts and legacies; that at the time of attesting this will he was indebted to Higden the witness (who was an apothecary) about 11*l.*, and at the time of his death about 18*l.*, which had been paid off by the executor before the trial of the issue; that he was indebted to Squire and Baxter, the other witnesses, who were two attornies in partnership, about 280*l.* at the time of attestation, which also (except a small mistake in miscasting) was out-set or discharged before the day of trial. If these were three credible witnesses within the statute of frauds, the jury found the devise to be sufficient; otherwise insufficient.

It was argued by Serjeant Prime, for the plaintiff, first, that the facts as stated did not make them interested witnesses; secondly, that supposing them to have been interested, yet the interest was removed before the time of trial. As to the first: they are no legatees, and derive nothing from the gift or bounty of the testator; they were justly entitled to payment of their debts, though no will had ever been made; the personal assets were the proper fund for them to resort to, and that is sufficient to pay their demands; so that they are not interested in the charge on the real estate. As to the second point: they were competent witnesses at the time of examination, their debts being then discharged. The word *credible* in the statute is an ambiguous expression, and capable of many senses; but there seems to be a parliamentary exposition thereof in the statute of 4 & 5 Ann. c. 16, s. 14, whereby three witnesses are required to authenticate a nuncupative will; and it is declared that such as are good witnesses in trials at common law, shall be deemed good witnesses to establish a nuncupative will. Now, allowing the same exposition to take place in the statute of frauds, then, as these witnesses would be unexceptionable on a trial at law in respect of interest, so they are competent (and therefore credible) witnesses to the present devise. And in this and the former argument there were cited divers cases to this purpose.

On the other side, Mr. Norton argued for the defendant, that at the time of the *attestation* the witnesses were interested, and therefore incompetent; and that this, and not the time of examination, is the proper time of inspecting their credibility; else it would open greater opportunities of fraud and perjury, than before the act; it would be setting up witnesses to hire; and would put the validity of the will in the power of the witnesses, by releasing or not releasing their interest. If a witness is unexceptionable at the time of attestation, and afterwards becomes infamous or insane, the will is nevertheless a good will: which proves that his condition at the time of attestation is alone to be regarded. And to this purpose were cited also divers cases; and it was observed, that most of the cases cited

on the other side were prior to the statute of frauds. He insisted, that the word *credible* means something more than *competent*; the law required competency before; and it is not to be imagined that the learned compiler of this statute (Lord Hale) would put in a word, which at best was superfluous. That in the statute of the 13 Car. 2, against deer stealing, and in all the game laws, the expression of *credible* witness is used, which hath always been understood to mean more than *competent*, and to give the justices a discretion whether they will convict upon such testimony or not, though the witness was in law strictly admissible. And he insisted on two cases, as directly in point; viz. *Hilliard v. Jennings* (1), and *Ansty v. Dowsing*, 19 Geo. 2.

On the argument, Lord Mansfield expressed his doubts of that generally received opinion, that Lord Hale drew the statute of frauds, 29 Car. 2, he having died in 1676, in the 28 Car. 2, and observed also, that the statute of the 4 & 5 Ann. was enacted to check the extravagant notions of some civilians, by which they excluded from being witnesses the children and family of the testator, as well as of the legatee; arising from a fiction in the Roman law, by which testaments are transacted in the form of a sale between the deviser and the devisee, to which none of either family were allowed to be witnesses.

Lord Mansfield's Judgment as to who are credible Witnesses.

Afterwards in the same term, Lord Mansfield delivered the opinion of the court. "In this case the real estate is only charged with payment of debts, as an auxiliary fund to the personalty; which stands in need of no assistance, being itself much greater than the debts: and at the time of trial, the three witnesses were not creditors to either the real or personal estate, but were so at the time of attestation. And herein the question is, whether this be a valid attestation, according to the statute of frauds. This is a doubt which sprang out of the general question in *Ansty v. Dowsing*, whether a benefit to a witness arising from a will shall annul his testimony, though at or after the testator's death he becomes totally disinterested. The solution of this question depends upon general principles, not upon the words of the statute. The statute declares no incapacity, lays down no legal conditions for admitting witnesses. The word *credible* is no term of art: it has only one signification, and that universally received; it is never used as synonymous to legal competency: it presupposes evidence to have been already given. The consideration of competent, is previous to that of credible: and in the statutes which have been mentioned at the bar, the expression so frequently used of credible witnesses is never construed to mean competent. To make the validity of a will depend upon the credibility of the witnesses would be absurd; since the testator could never foresee what credit might hereafter be given to them. It is

(1) 1 Ld. Raym. 505.

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true, that in *Butler and Baker's case*(*m*), the third caution there given is, to call credible witnesses: but that is only a loose and casual expression; though perhaps the penner of this statute might take his hint from thence. I cannot conceive (for the reasons I formerly mentioned) that this statute was drawn by Lord Hale, any further than perhaps by leaving some loose notes, which were afterwards unskilfully digested. I therefore think, that the epithet *credible*, in this statute, is used as a word of course, but is unfortunately misapplied: if it signifies competent, that is implied in the word witness alone: if it signifies any thing more than competent, it is (as was before observed) absurd. Perpetual doubts have arisen upon every clause of this statute, not only among the unlearned, for whom it ought to have been calculated; but even among the learned also. In a statute so inaccurate, I therefore think the word *credible* might accidentally slip in, and ought not to be attended to as if it carried any special legal meaning. I shall therefore consider the statute, as only requiring the attestation of three subscribing witnesses, that is, legal competent witnesses; and cannot but observe, that the necessity of having subscribing witnesses to any instrument never existed before in this country. The statute determines no point of time for the competence of witnesses; and as I think that competence is not confined to the time of attestation, so I think that the incompetence of witnesses at the time of examination could never be intended for a question by the legislature, since however competent at the time of attesting, they may become insane or infamous before the time of examination.

“The competence of witnesses to wills must therefore depend upon the general rules of competence for all other witnesses. I will therefore consider, first, how this matter of competent attestation would have stood upon general principles, supposing no judicial determination had been given. Secondly, how the authority of judicial determination stands; for if there are any in point, they are certainly proper to be adhered to: and, thirdly, how these two rules may be applied to the present case.

“First, as to general principles: the power of devising ought to be favoured. It naturally follows the right of property. It subsisted in this kingdom before the Conquest, and till about the reign of King Henry II., when it ceased in consequence of feudal tenure, not from any express prohibition. The doctrine of uses revived this power; and the statute of uses again accidentally checked it. This occasioned the statute of wills to be soon after made; which received a great enlargement by the alteration of tenures in the reign of King Charles II. And this testamentary power over property is more reasonable in this kingdom, than ever it was among the Greeks and Romans; since by reason of primogeniture, and other ex-

clusive rules of descent, the succession *ab intestato* among us is not so equal and universal as among those people. The statute of the 29 Car. 2, was not meant to check this power, but only to guard against fraud. In theory it seemed a strong guard: in practice it may be some guard. But I believe more fair wills have been destroyed for want of observing its restrictions, than fraudulent wills obstructed by its caution. In all my experience at the Court of Delegates (and I have heard the same from many learned civilians), I never knew a fraudulent will which was not legally attested. Courts of justice ought therefore to lean rather against, than in support of, any too rigid formalities.

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“Suppose the subscribing witnesses honest; how little need they know? They do not know the contents; they need not be together; they need not see the testator sign; they need not know it to be a will. At the time this act was made, the law rejected no witness to prove a will, unless at the time of his examination his testimony tended to support his own title, and enable himself to hold or recover an interest under it. In the ecclesiastical court, the probate is conclusive to every one as to every part. If a legatee came to prove it, he intitled himself to his legacy. But if the legacy was contingent, and at the testator's death could not take effect; if he had the same or a greater interest, though the will should be set aside, he was a witness: a release, payment or tender, made him a witness. In the courts of common law, where the witness had a charge upon land devised to another, he was just in the case of a personal legatee. If he had as great an interest the other way; if his interest at the testator's death could never take effect; if there was a release, and I will add, as by necessary consequence, if there was payment or tender, he was a witness. Nice objections, of a remote interest, which could not be paid or released, though they held in other cases, were not allowed to disqualify a witness in the case of a will: as parishioners might prove a devise to the use of the poor of the parish for ever (*n*). Interest in a witness is certainly an objection to his competency: this arises from a presumption of bias: it is no positive disability, as if a particular age was required and wanting in a witness: it is only presumptive, and presumptions only stand until the contrary is made apparent: if the bias be taken off, the objection ceases. There is no presumption of bias in a witness, who at the time of signing probably knew not the contents of the testator's will, and after his death is discharged from, or has renounced all interest arising from thence. Nothing can be more reasonable than to allow this objection of interest to be purged by matter subsequent to the attestation, and previous to the trial, if it were only for the benefit of third persons. Shall tokens of kindness to friends,

(*n*) 2 Sid. 109.

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servants, or the like, who may be unwarily called in as witnesses, vitiate a solemn and well-weighed disposition of a man's estate: when by payment or release this interest may be at once removed? This seems the more unreasonable, since there are methods by which legatees may by circuitry be witnesses to a devise in their own favour, without either payment or release: if land be once charged with legacies by a well attested will, legacies may be given by an unattested codicil to the witnesses of that very will.

"As to the judicial authorities: in all cases of testimony, it hath often been determined, that a release takes off all objection in point of interest. And therefore I give credit to the dictum of Judge Powis (o), not on the authority of the reporter, but because it is consonant to the known practice of Westminster Hall in other cases: viz. that it had been solemnly agreed by the judges, that where a person had a legacy given, and did release it, he was a good witness to prove the will. The case of *Hilliard v. Jennings* (of which Carthew's is the best report, he having been counsel in the cause), in substance, is much the same as that of *Anstey v. Dowsing*. In this last case, the wife of one of the witnesses had an annuity charged on the lands devised; no release was had; no payment, no tender could be made; and as husband and wife are considered as one person, this was a material objection to his testimony; and it was upon the particular circumstances of that case, and not upon any general doctrine, that the judgment in that case was founded, as Mr. Justice Denison soon after assured me. It is true, the Lord Chief Justice Lee, in delivering his opinion, went into the general point, and argued as if the credit of a witness could not be purged or varied by an act subsequent to the attestation; which he grounded on a maxim of the Roman law, *conditionem testium inspicere debemus eo tempore cum signarent*. But this was not sufficiently considered; as will appear from a short view of the Roman testaments, which originally could only be made as a legislative act *in procinctu*, or in *comitiis calatis*: but after the law of the Twelve Tables, which gave the power of private testaments, testamentary matters were usually transacted *per æs et libram*, under the fiction and in the form of a sale or contract between the testator and the legatees. These symbols were used before the introduction of written instruments: and to this symbolical sale five, and afterwards to the written instrument seven, witnesses were required, who must be citizens, freemen, adults, and attended with other qualifications. This positive capacity was the condition of the witnesses referred to in the Roman law, which was requisite to be in them at the time of their attestation or signing, and not afterwards; in like manner as where

(o) Viner, tit. Evidence, F. s. 53.

a surrender must be made into the hands of two copyhold tenants, it will not be good if made into the hands of a stranger, though he should afterwards become a copyholder. The interest of the witnesses was not in the contemplation of the law; for heirs were admitted as subscribing witnesses after the symbolical sale had ceased, as were also *cestui que trusts* and legatees. The consequence of this doctrine of Lord Chief Justice Lee was, that no creditors or legatees, if the estates were charged to pay them, could at any rate be good witnesses. And yet, when Lord Aylesbury died in February, 1746, leaving a new-made will, witnessed by three servants, to all of whom he had left legacies charged on lands, which they released before examination, and it appearing that by a former will, dated in 1744, and witnessed by other persons, he had left the same legacies, the lord chancellor, in 1748, held them to be good witnesses to the second will, for it was indifferent to them which will should stand good, and, besides, they had released. And in the case of *Baugh v. Holloway* (p), Lord Raymond lays down the same general doctrine that I would now establish; and also another point, which agrees with my opinion, that an interested witness may prove a devise to another, though not to himself. In all judicial determinations, devises have been considered, not in the nature of wills by the Roman law, but as dispositions and conveyances of real estates; whence it is, that by such disposition of all one's estate, lands that are purchased subsequent thereto will not pass: therefore the interest of witnesses to devises should be governed by the same rules as in all other written dispositions of real estates. As to the notion started in the argument of *Ansty v. Dowsing*, of four devisee witnesses dividing an estate among themselves, by reciprocally attesting for each other; this might as well be effected by four distinct devises separately attested by three of them in rotation: but in either case, the very contrivance would appear so fraudulent, as alone to be sufficient to set it aside.

“With respect to the present case on its own particular circumstances: these witnesses are in the nature of legatees, not several devisees. The presumption of interest at the time of attestation is taken off at the death, by the principal funds being more than sufficient: it is taken off before the trial, by the debts being paid. But the benefit, at the time of attestation, was nothing. It doth not appear the principal funds then were deficient. The legacy is a bare possibility, upon a contingency, which contingency never happened. But I will go farther; I think a charge to pay debts ought not to incapacitate subscribing witnesses, although they wanted and claimed the benefit of it. Every honest man should make that charge in his will. He who omits it, is said to sin in his grave. Fraud

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cannot be presumed, from inserting a clause which it would be iniquitous not to put in. No man would resort to wicked and fraudulent practices, to get his debts charged upon land by the will of his debtor. If he suspected the debtor's circumstances, he would not stay till his death, or trust to a revocable security. The presumption of fraud in this case would be against justice and truth; and the public inconvenience so great, that hardly a will could stand. This charge ought to be in every will. The persons attending upon a dying testator, and therefore most common witnesses, are generally in some degree creditors, such as servants, parson, attorney, and apothecary; and the disallowing such persons to be witnesses cannot answer any ends of public utility. Upon the whole, we are all of opinion, that this will is duly attested by three witnesses (q)."

Case of *Hindson v. Kersey*, Lord Camden's Judgment.

Afterwards, in the case of *Hindson v. Kersey*, E. 5 Geo. 3, a special case was reserved from Appleby assizes, before Mr. Justice Bathurst, in 1760, which was thus: John Knott, being seised of a messuage and other tenements, at Mauls Meburn in the county of Westmoreland, by his will bearing date August 16, 1734 (which was before the Mortmain Act of 9 Geo. 2, and therefore that was out of the question), devises his messuage and lands in the will particularly mentioned (after the death of his wife) to John White, Christopher Moss, Henry Holme, William Dent, Robert Burra, and William Burra, in trust, that they and their successors for ever dispose of the rents and profits to poor orphans, aged and impotent people, within the township of Mauls Meburn, and put out the children of such poor people apprentices. Other lands and tenements there he devised to his wife for life, remainder to Anne Gibson for life, remainder to Mary Brown for life, remainder to Anne Hebson in fee. Anne Gibson (after the wife's death) entered as devisee on that part devised to her; and the heirs at law brought an ejectment, alleging that the will was not duly attested according to the statute of frauds. The witnesses were two of the said trustees, Henry Holme and Robert Burra, and the third John Mitchell; all of whom, at the time of the attestation, and at the death of the testator, and long after, were respectively seised of messuages and tenements in the said township of Mauls Meburn, and were assessed to and paid the poor tax there. But before the time of trial, the said Henry Holme and Robert Burra released all their interest under the will to the other trustees, and they and also John Mitchell conveyed away their respective messuages and tenements within the said township. The question was, whether, under these circumstances, the said writing purporting to be the will of the said John Knott, was sufficient and

(q) Black. Rep. 95; S. C. 1 Bur. 414.

effectual to pass the aforesaid lands and tenements to the said Anne Gibson?—Upon the hearing of this cause in the Court of Common Pleas, the three puisne judges delivered their opinion in favour of the will; and the Lord Chief Justice Pratt (afterwards Lord Camden) declared his opinion against it, and argued to the following effect: “Two questions arise out of this will; first, whether it is executed according to the statute of frauds; and secondly, if not, whether the objection to it is cured by the late act. In handling this subject, I shall be obliged to differ from the opinion of the Court of King’s Bench, delivered by Lord Mansfield in the case of *Wyndham v. Chetwynd*; or rather (for so I wish to put it), I shall agree with the judgment of the same court delivered by Lord Chief Justice Lee, in the case of *Ansty v. Dowsing*. For as both the opinions are justified by authorities of equal weight, a man may take either side without hazarding his reputation. The case of *Wyndham v. Chetwynd* supposes that the word *credible* in the act is only a word of course, and ought not to be attended to as conveying any special legal meaning; and that the other word, *witness*, is to be expounded by common law analogy. From whence this rule was taken, that as at common law no man was allowed to be a witness to prove an interest for himself; so, since the statute, no man shall by his own subscription take an interest which he could not prove at the time by his own examination: and from the rule thus framed it was concluded, not only that a release or payment will re-establish the witness, if his incompetency really stands in the way; but further, that such a witness may, even without a release, be competent enough to prove the will for every person except himself.

Lord Camden’s Declaration against the Opinion of Lord Mansfield, in *Wyndham v. Chetwynd*.

“In opposition to this reasoning I propose to maintain, that this credibility, which I shall prove to be competency, is a necessary and substantial qualification of the witness, at the time of attestation; that if the witness is incompetent at that time, he cannot purge himself afterwards, either by release or payment, so as to set up the will; and that he cannot be a witness in that case to establish any part of the will, but that the whole is void for ever. As my brothers differ with me upon the second question, by holding that the witnesses are competent by the rule of law, I might, if I thought it fitting, leave all the other points undiscussed, as not absolutely necessary to the decision of this case. And I should have been glad for several reasons to have done it, if other reasons more weighty with me had not determined me the other way. One is, that as the whole argument is connected by a chain, those parts whereon I am bound to speak could not be so clearly illustrated, if the others were omitted; for they all throw light upon each other, and the former are proper and material introductions to the latter. Another reason is, that as the same case may again exist, and even this case may yet come before another court,

Lord Camden's Declaration against the Opinion of Lord Mansfield in *Wyndham v. Chetwynd*.

and likewise, as no cases of the like kind, in my opinion, are cured by the late act, but that future wills, as well as those that are past, under such like attestations, must occasion the same questions, when they happen to be contested: I think myself bound in duty to declare my dissent to the last opinion of Lord Mansfield, and do my best endeavours to restore that of Lord Chief Justice Lee, which has been so considerably shaken, I may say overturned; because the last opinion, if it is acquiesced under, almost always governs, and becomes the leading case. I am very sensible at the same time, that I am destroying an honest will, upon a nominal objection; for the interest here which I must treat as a serious incapacity, is too slight even to disparage the witness's credit, if he could be sworn; and yet I must adjudge him, upon this objection, to be a person so destitute of all credit, that he is not fit even to be examined. But as it is not my business to decide cases by my own rule of justice, but to declare the law as I find it laid down; if the statute of frauds has enjoined this determination, it is not my opinion, but the judgment of the legislature. As I am satisfied, however, that this will was fairly executed, I am very glad my brothers, by differing from me, have enabled me to give judgment in favour of it, against my own opinion. Before I proceed, I desire it may be understood, that I do by no means deny the authority of the judgment in *Wyndham v. Chetwynd*; for that case was not determined only upon the general principles, which I am obliged in this argument to deny, but upon its own general as well as particular circumstances, none of which can be applied to the case of a mere legatee witness. The first general inquiry then being this, Who are those witnesses which are described in the act by the word *credible*? I answer, in one word, they are *competent* witnesses, and no other. And when it is further asked, At what time must the witnesses be endued with this qualification? I say, that they must be clothed with it at the time of attestation. And here I must premise one observation, that there is a great difference between the method of proving a fact in a court of justice, and the attestation of that fact at the time it happens. These two things I suspect have been confounded. Whereas it ought always to be remembered, that the great inquiry upon this question is, how the will ought to be attested, and not how it ought to be proved. The new thing introduced by the statute is the attestation; the method of proving this attestation stands as it did upon the old common law principles. Thus, for instance, one witness is sufficient to prove what all the three have attested; and though that witness must be a subscriber, yet that is owing to the general common law rule, that where a witness hath subscribed an instrument, he must be always produced because it is the best evidence. This we see in common experience; for

after the first witness has been examined, the will is always read. The statute says, the will must be executed before three credible witnesses. If it be asked, whether the quality of credibility is requisite in the witness at the time of attestation? I answer, Nothing can be more clear upon the words, if credibility means any thing; for what is the clause, but a description of those solemnities that are to attend the execution? among which the presence of credible witnesses is made necessary. It is admitted, that if any other description had been added to the witnesses, that must have belonged to them at the time; as if three Englishmen, or three full aged persons had been required, these adjuncts would have been necessary at the time; and if so, I see not by what rule of construction one epithet or adjunct can be distinguished from another. Nay, if the word *credible* be expunged, and the word *witness*, as it is admitted, doth of itself alone include *competent*, still, competency must be essential to the witness at the time of execution: and a competent witness in the eye of the law is a witness that is not infamous nor interested. So that, take it which way we will, an interested witness cannot be the witness the law intends to be present at the execution. And that the statute had a main view to the quality of the witnesses, will appear from this consideration; namely, that a will is the only instrument in it required to be attested by subscribing witnesses at the time of execution. It was enough for leases and all other conveyances, marriage agreements, declarations, and assignments of trusts, to be in writing. These were all transactions of health, and protected by valuable considerations and antecedent treaties; the power of a court of equity was fully sufficient to meet with every fraud that could be practised in these cases, after the contract was reduced into writing. But a will was a voluntary disposition, executed suddenly in the last sickness, oftentimes almost in the article of death. And the only question that can be asked in this case is, Was the testator in his senses when he made it? and consequently, the time of execution is the critical minute that requires guard and protection. Here you see the reason why witnesses are called in so emphatically. What fraud are they to prevent? Even that fraud so commonly practised upon dying men, whose hands have survived their heads, who have still strength enough to write a name, or make a mark, though the capacity of disposing is dead. What is the condition of such an object in the power of a few who are suffered to attend him, wheedled or teased into submission for the sake of a little ease? Put to the laborious task of recollecting the full state of all his affairs, and to weigh the just merits and demerits of those who belong to him, by remembering all, and forgetting none. Such an act to be done at such a time is so pregnant with suspicion, that a formal declaration of the testator's sound and disposing

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Period of Credibility.

Period of
Credibility.

mind and memory, though he is weak in body, is grown to be a common introductory clause to almost every testament. Who then shall secure the testator in this important moment from imposition? Who shall protect the heir at law, and give the world a satisfactory evidence that he was sane? The statute says, three credible witnesses. What is their employment? I say, to inspect and judge of the testator's sanity before they attest. If he is not capable, the witnesses ought to remonstrate and refuse their attestation. In all other cases the witnesses are passive; here they are active, and in truth the principal parties to the transaction; the testator is intrusted to their care. Sanity is the great fact the witness has to speak to, when he comes to prove the attestation; and that is the true reason why a will can never be proved as an exhibit *vivâ voce* in Chancery, though a deed may; for there must be liberty to cross-examine to this fact of sanity. From the same consideration, it is become the invariable practice of that court never to establish a will unless all the witnesses are examined; because the heir has a right to proof of sanity from every one of them whom the statute has placed about his ancestor. And yet this duty of the witness, this solemn trial of the testator's sanity, hath been called a matter of form, and of no use to prevent frauds. I am of a very contrary opinion. That many fraudulent wills have been made since the statute, and all formally executed, I have no doubt; and I am afraid these frauds will continue to the end of time; for what law can totally extinguish wickedness, and reform mankind? But if a law is to be slighted because it doth not entirely eradicate the mischief it was made to prevent, no law whatever can escape censure. Many bad wills have been made; but who can tell me how many have been prevented? The design of the statute was, to prevent wills that ought not to be made, and always operates silently by intestacy. I have no doubt but that a thousand estates have been saved by this excellent provision. It is called a guard in theory only; whereas almost every delirious paralytic, that is suffered to die intestate, is preserved by this law, and give testimony of its utility. But if you once treat this part of the solemnity as a form, and call the devisees and legatees into the sick man's chamber; the whole ceremony will then, I admit, become a mere form: nay it will be worse, it will be a snare to the testator; and instead of being a prevention, it will be a protection of fraud. I will close this reasoning with the words of the court in the case of *Lea v. Libb*, as reported in Carth. 37. 'Tis true, the intent of the statute was to prevent fraud; but though no suspicion of fraud appears in this case, yet the statute hath prescribed a certain method which every one ought to pursue to prevent fraud.' And if this is the true language of the statute of

Criterion of
Credibility
by Statute.

frauds, the consequence is undeniable, that the incompetency can never be purged, and that the whole will is void for ever.

Criterion of
Credibility
by Statute.

“This being the criterion of credibility, I proceed to consider how far the witnesses to this will are affected by it. The case is this:—The testator deviseth certain lands to trustees, to be applied to the use of such poor as by reason of infancy, impotence, or old age, are unable to work, and to place out apprentices the children of such poor. The three witnesses who attested the will are seised of lands in fee within the parish at the time of attestation. The objection is, that these witnesses cannot be admitted to prove the will in court while they remain so seised, because by the establishment of the will they will derive an interest to themselves in respect of those lands. Their interest is this, that as the poor rate must be reduced in proportion to the value of this benefaction, their estates will become rate-free for so much for ever. And although the devise at the time of the testator’s death was future, and did not take effect till some years after, yet it was a present benefit to the owner of those lands, and made them immediately more valuable in consideration of this future easement. It is objected, that the interest claimed under the will is nothing; that it is nothing at present, that it is contingent in future, and that at most it is extremely minute. It is true, it is not given to the parishioners, but it is an interest derived to the parishioners in consequence of the will; which is the common case of penalties given to the poor, they gain if the will is established, they lose if it is set aside. I do admit also it is no easement in present, but in respect of future easement, it is even now a present and lasting benefit; and in truth, all future interests, whether certain or contingent, whether now or hereafter to be enjoyed, are present benefits, have a price, and are saleable. The Court of Chancery therefore hath very sensibly pronounced possibilities to be vested interests, and made them transmissible. A fee expectant upon a thousand years term has been sold for money. Let me put the case of an executory devise of an estate of 10,000*l.* a year, and the life before it in a deep consumption, (I am entitled to put the strongest case I please), could this devisee be a competent witness to prove the will? The answer must be, he could not. Tell me then what chances are valuable and what not. Till this line is drawn, I must insist that all chances are valuable. As to the objection that the interest is minute, and that a small interest, as in *Townshend’s case*, ought not to disqualify witnesses; I do conceive, that however that point might have been litigated formerly, yet now the law is clearly settled, and the witness must be rejected, if he has any interest, be it ever so small. The point was disputed for above twenty years, in the case of toll or custom claimed by the city of London, upon importation, called by the name of water bailage; the question was, whether freemen might be

Criterion of
Credibility
by Statute.

witnesses? Nothing can be more minute than such an interest, and yet after many opinions *pro* and *con.*, it was finally settled that they were not witnesses. True it is, that the interest of the witnesses in some cases is drawn so fine, that it is scarce perceptible, and yet that glimmering, that *scintilla*, shall be as powerful to exclude the witness as the most substantial proof. The true ground whereof is this, that as no positive law is able to define the quantity of interest that shall have no influence upon the minds of men, it is better to leave the rule inflexible than permit it to be bent by the discretion of the judge. And therefore to divest a legatee witness of all kind of interest in time to come, the late act hath taken the most effectual method by making his legacy totally void." In the present case, the parties, to avoid any further litigation, came to an agreement, and divided the estate amongst them.

In the case of *Pendock v. Mackender*, H., 28 Geo. 2 (s), on a special case, reserved at the assizes, the question was, whether one of the witnesses to the will was a sufficient witness within the statute, who, before the time of attestation, had been indicted, tried and convicted for stealing a sheep, and was found guilty to the value of ten pence, and had judgment of whipping. After three arguments at the bar, the whole Court of Common Pleas were clearly of opinion that he was not a competent witness, and laid it down as a rule, that it is the crime that creates the infamy, and takes away a man's competency (t), and not the punishment for it; and it is absurd and ridiculous to say it is the punishment that creates the infamy. The pillory has been always looked upon as infamous, and to take away a man's competency as a witness. But to show the absurdity of this notion, suppose a man is convicted on the statute against deer stealing, there is a penalty of 30*l.* to be levied by distress, and if he has no distress, he is to be put in the pillory; so that if the pillory be infamous, the person convicted (according to this notion) will be so if he has not 30*l.*, but if he has 30*l.* he will not be infamous. Petit larceny is felony; and there is no case where a person convicted thereof was ever admitted to be a witness.

Of Per-
sonalty.

Of Personalty.—A written will of goods and chattels is not altered as to this matter by the said statute, but continues as it was before.

Witnesses.

Concerning which, it is said (u), that by the canon law, and also by the common law, two witnesses are requisite to prove a will of goods.

For one witness, by the civil law, unto which the other laws are conformed in this matter, is as no witness at all (x).

So in the case of *Thwaites v. Smith*, M., 1696 (y). Before the Delegates. Where there were only three witnesses to the

(s) 2 Wils. 18.

(u) 3 Salk. 396.

(y) 1 P. Will. 13.

(t) [See Lord Stowell's.]

(x) 1 P. Will. 13.

will, and two of them children of the residuary legatee, the will was set aside, children (by reason of the affection and duty which they owe to their parents) not being allowed to be witnesses by the civil law. But on a commission of review being sued out, the parties agreed, and the executor renounced. And the reporter makes a query, Whether, if the will in question appeared to be written or so much as subscribed by the testator's own hand, it would not have been good without any witness at all.

Of Person-
alty.

And Swinburne says, if it be certain and undoubted that the testament is written or subscribed with the testator's own hand, in this case the testimony of witnesses is not necessary; but if it be doubtful whether the testament were written or subscribed by the testator, in this case the testimony of witnesses is necessary to confirm the same to be the testator's own hand (z).

And although witnesses to prove the will may be necessary, yet it doth not seem to be of absolute necessity that the names of these witnesses should be by them subscribed to the will (a).

[Custody is a sufficient publication of a will (b).—ED.]

And by Gilbert, Chief Baron (c): If a will be made of goods, and written in the party's own hand, without any witness at all, it is allowed to be good, and the statute doth not require any witnesses to chattels only.

In the case of *Limbery v. Mason and Hyde*, T., 8 Geo. 2 (d), several cases were cited in which these strict formalities were determined not to be requisite. As in the case of *Wright v. Walthoe*, H., 1710. There were three testamentary schedules, whereof one was without date; the second was written *In witness*, but there was no witness; the third concluded abruptly; yet, being written by the testator, they were declared to be his will (e).

James Savage, deceased, gave instructions to his attorney to prepare a will for him. The attorney prepared it with several *quæres* and abbreviations, and the deceased made several alterations and interlineations in the draft. He afterwards, with his own hand, wrote the said will over fair from the said draft, adding only a bequest of the residue, which he had not made in the draft; and he concluded as follows:—

A Will disposing both of Real and Personal Property, with a Clause of Attestation, but no Witnesses, established as to the Personal Property.

“ In witness whereof I have to this my last Will and Testament contained in Three Sheets of Paper, to the first two
“ whereof I have set my Hand and the last my Hand and Seal
“ this in the 16 Year of the Reign of our Sovereign
“ George the Third of Great Britain France and Ireland King
“ defender of the faith and in the year of our Lord One Thou-

(z) Swin. 353.

(a) [Brett v. Brett, 3 Ad. 224.]

(b) [Miller v. Brown, 2 Hagg. 211.]

(c) Gilb. Rep. 260.

(d) [See the cases cited in *Limbery v. Mason* and *Cunningham v. Ross*,

2 Lee, 478.]

(e) Comyn, 452.

“ sand Seven hundred and Seventy Seven JAM^s. SAVAGE.
 “ Signed sealed published declared and delivered by the tes-
 “ tator JAMES SAVAGE as and for his last Will and Testament
 “ in the presence of us who have at his Request and in pre-
 “ sence of each other set our names as Witnesses Hereto.”

The deceased had subscribed his name to each sheet, and to the last sheet he did affix his seal. The clause of attestation was not subscribed by any witnesses.

The paper was considered imperfect by Dr. Calvert, on account of the clause of attestation not being witnessed; and he admitted parol evidence, on which he set aside the paper.

The Delegates, Sir William Henry Ashhurst, Sir Beaumont Hotham, and Dr. Matham, were of opinion that, it being a will both of real and personal property, it was *reddendo singula singulis* a perfect disposition of personal estate, and therefore a good will; and they rejected parol testimony against it (*f*).

[Where there is an attestation clause and no witnesses, there is a *primâ facie* (*g*) presumption against the validity of the will; but it is in cases where personalty only is disposed—a very slight presumption, and liable to be rebutted by slight evidence, that the act of God prevented the testator from finishing the instrument, or that he intended it to operate as his will (*h*). It is to be observed, however, that where *realty* as well as *personalty* is disposed of (*i*), the Prerogative Court requires more stringent proof, and will not grant probate of an undisputed will of realty and personalty where there is an attestation clause and no witnesses, without a proxy of renunciation from the parties interested in the event of an intestacy.—ED.]

Attestation
Clause not
signed by
Testator.

So in the case of *Worlick v. Pollet*, 1711 (*k*). Before the Delegates. The testatrix sent for a person to make her will, gave him instructions for the same; when he had wrote it, he read it to her; she approved it; declared it to be her last will; sent for three witnesses to see her execute it; *Signed and sealed* was written, but she died before any other execution;

(*f*) *Cobbold v. Baas*, 4 Ves. jun. 20, n.

(*g*) [*Scott v. Rhodes*, 1 Phillim. 19; *Harris v. Bedford*, 2 Phillim. 177; *Beaty v. Beaty*, 1 Add. 154; and see note.]

(*h*) [*Harris v. Bedford*, 2 Phillim. 178; *Thomas v. Wall*, 3 Phillim. 23; *Buckle v. Buckle*, 3 Phillim. 323,—in this case the fact of the paper being found sealed up was held to rebut the presumption; *In the goods of Jerram*, 1 Hagg. 550; *Doker v. Goff*, 2 Add. 42,—in this case the word “witnesses” was held a far slighter presumption than a regular attestation clause; *In the goods of Hurrill*, 1 Hagg. 252; *In the goods of Wenlock*,

1 Hagg. 551; *In the goods of Thomas*, 1 Hagg. 596; *In the goods of Edmonds*, 1 Hagg. 691; *Bragge v. Dyer*, 3 Hagg. 207; *In the goods of Jerram*, 1 Hagg. 550; *In the goods of Vanhagen*, 1 Hagg. 478; *In the goods of Sparrow*, 1 Hagg. 479.—ED.]

(*i*) [*In the goods of Herne*, 1 Hagg. 226; *Tudor v. Tudor*, 4 Hagg. 199, and note (*u*); *Douglas v. Smith*, 3 Knapp.; *Elsden v. Elsden*, 4 Hagg. 183; *Gillow v. Bourne*, 4 Hagg. 192; *Reynolds v. White*, 2 Lee, 214; *Reeves v. Glover*, 2 Lee, 359; and see *In the goods of Jonathan Rudge*, Jurist, vol. v. p. 40.]

(*k*) Comyn, 452.

yet it was held a good will. For though the first sentence for it was reversed upon an appeal, yet it was afterwards affirmed by the Delegates.

In the case of *Brown v. Heath*, 1721 (*l*), a will of a real and personal estate was prepared in order to be executed, though there were several blanks in it, and the testator died before execution; yet it was held a good will for the personal estate; and though more was intended to be done, yet it shall be good for what is done.

So in the case of *Loveday v. Claridge*, 1730 (*m*). The testator intending to make his will, pulled a paper out of his pocket, wrote down some things with ink, some with a pencil; and though it had no conclusion, but appeared to be a draught which he intended after to finish, for it was not signed, but had at the end a calculation of his effects, an account of his tea table, and an order to pay a dividend of stocks; yet it was held to be a will.

So in a case where the testator gave instructions to make his will of his real and personal estate; and when it was brought to him, he made several alterations, and then wrote the whole over as altered with his own hand; this being found in his study, though not signed or sealed, was held a good will (as to the personal estate). It is true, the first sentence was, that he died intestate; but that was reversed by the Delegates (*n*).

So also a will made under a power, but not duly attested to pass real estate, was deemed a good execution of the power as to the personalty (*o*).

[The presumption of law is the same in the case of a paper written but not signed by the testator, as in that of an attestation clause without witnesses, mentioned above. But it should be observed, that the proof of handwriting alone is not sufficient to set up a disputed instrument without some concomitant corroborating circumstance, such, for instance, as the place of finding (*p*).

Paper written but not signed by Testator.

[Though the instrument be written in another person's hand, and has never been signed by the testator, yet it may operate as a good testament of personal estate (*q*). And though a man die before the instructions which he has given for making a will have been formally executed, and though they have not

(*l*) Comyn, 453.

(*m*) Ibid. 452.

(*n*) Ibid. 453.

(*o*) *Duff v. Dalzell*, 1 Bro. 147.

(*p*) [*Machin v. Grindon*, 2 Lee, 406; *Constable v. Steibel*, 1 Hagg. 60; *Saph v. Atkinson*, 1 Add. 213; *Crisp v. Walpole*, 2 Hagg. 531; *Rutherford v. Maule*, 4 Hagg. 213;

Russell v. Marriott, 1 Curteis, 9,—nor was this doctrine of the Court of Probate denied in *Alderman Wood's case*, although the nature of the concomitant circumstances were very slight. See title *Practice—Evidence*, vol. iii. p. 325.]

(*q*) [Wentw. c. i. p. 15, 14th ed.]

been read over to him, they may constitute a valid will of personalty (*r*).

A Will by
Interrogato-
ries.

[A will made by interrogatories may be valid (*s*). Instructions may be conveyed to the drawer from the deceased through the medium of a third person, although such a case awakens the vigilance of the court (*t*). But it must be reduced into writing during the lifetime of the deceased, or it would otherwise be a nuncupative will (*u*) and void under the statute of frauds (*x*).

Instructions
for a Will.

[The words of a testament of personalty need not be direct or imperative, but may be in the form of a wish or request. We have seen that instructions for a will may be operative as a will itself. In *Bone v. Spear* (*y*) a document indorsed "Intended Will" was held testamentary, where the deceased had been taken suddenly ill and declared "that he had written the heads of his will, and that it would do very well. In *Hattatt v. Hattatt* (*z*) a *subscribed* entry in an account-book carefully preserved was admitted to probate, but it contained these words—"I intend this as a sketch of my will, which I intend making on my return home." In *Torre v. Castle* (*a*) (the case of Lord Scarborough's will), the document was indorsed "Head of Instructions to my Solicitor;" but it concluded "This is my last will and testament—Scarborough." It was admitted to probate. Still a mere paper of instructions, although holograph and signed, will not be deemed testamentary, unless some act of God prevented its due execution. A will may be written in any language. In *Foubert v. Cresseron* (*b*) it was written in a foreign language.—ED.]

Language.

Unexecuted
Paper.

Many cases might be cited in which an unexecuted paper has been held to be a good will as to personal property, and others in which it has been decided not to be. The doctrine of the ecclesiastical courts is, that it is incumbent on the party

(*r*) [Viner's Abr. Devise (A 2) 4; *Barrow v. Barrow*, 2 Lee (as to copies of instructions); *Goodman v. Goodman*, 2 Lee, 109; *Robinson v. Chamberlayne*, 2 Lee, 129; *Bower v. Malpas*, 2 Lee, 358; *Green v. Skipworth*, 1 Phillim. 59; *Wood v. Wood*, 1 Phillim. 370 (and the cases therein cited by Sir John Nicholl); *Huntington v. Huntington*, 2 Phillim. 213; *Langmead v. Lewis*, 2 Phillim. 326; *Lewis v. Lewis*, 3 Phillim. 112; *Allen v. Manning*, 2 Add. 490, and note (*a*), 494; *In the goods of Bottgate*, 1 Hagg. 67; *Burrows v. Burrows*, 1 Hagg. 109; *Masterman v. Maberley*, 2 Hagg. 247.]

(*s*) [*Green v. Skipworth*, 1 Phillim. 53; Swinb. pt. ii. s. 25, pl. 9; but see

Cranvell v. Saunders, Cro. Jac. 497.]

(*t*) [*Lewis v. Lewis*, 3 Phillim. 309; *MacLae v. Ewing*, 1 Hagg. 317.]

(*u*) [Vide post.]

(*x*) [*Sikes v. Smith*, 2 Phillim. 355; *Rockell v. Youde*, 3 Phillim. 141; see also the case of *Nathan v. Morse*, 3 Phillim. 529, where testator died while dictating, and a legacy ordered by testator, but forgotten by drawer of the will, was inserted after his death; this part of the instructions was not allowed to be taken probate of, but separated from the rest.—ED.]

(*y*) [1 Phillim. 345.]

(*z*) [4 Hagg. 211.]

(*a*) [1 Curt. 303.]

(*b*) [Show. P. C. 194; Swinb. pt. ii. s. 25, pl. 3.]

propounding such a paper to show that it was the intention of the deceased to execute it, and that he was prevented so doing by *sudden death* or *indisposition*, which rendered him incompetent to perform any serious or rational act.

[The distinction between an *imperfect* and an *unexecuted* paper should be carefully observed. It is clearly laid down by Sir John Nicholls in *Montefiore v. Montefiore* (c). “The legal principles as to imperfect testamentary papers, of every description, vary much according to the stage of maturity at which those papers have arrived. The presumption of law, indeed, is against every testamentary paper not actually *executed* by the testator; and so executed, as it is to be inferred, on the face of the paper, that the testator *meant* to execute it. But if the paper be complete in all *other* respects, that presumption is slight and feeble, and one comparatively easily repelled. For *intentions, sub modo* at least, need not be *proved* in the case; that is, the court will *presume* the testator’s intentions to be as expressed in *such* a paper, on its being satisfactorily shown that its not being executed may be justly ascribed to some *other* cause, and not to any *abandonment* of those intentions so expressed on his the testator’s part. But where a paper is unfinished as well as unexecuted, (especially where it is just begun, and contains only a few clauses or bequests,) not only must its being unfinished and unexecuted be accounted for as above, but it must also be *proved* (for the court will not *presume* it) to express the testator’s intentions, in order to repel the legal presumption against its validity. It must be *clearly made to appear*, upon a just view of *all* the facts and circumstances of the case, that the deceased had come to a *final* resolution in respect to it, *as far as it goes*; so that by establishing it, even in such its imperfect state, the court will give effect to, and not thwart or defeat, the testator’s real wishes and intentions, in respect to the property which it purports to bequeath, in order to entitle *such* a paper to probate, in any case, in my judgment.”—ED.]

Distinction between unexecuted and imperfect Papers.

The following cases have been decided with respect to unexecuted papers, some of which were established as valid wills, and the others were held not to be.

Catharine Lloyd, an old lady, wrote the following letter, directed to James Browning, Esq., at his chambers, Lincoln’s Inn Square:—

“I make no doubt S^r if what I am now going to say should

Cases of unexecuted Papers established as Wills.

A Letter to Attorney, containing Instructions for drawing a Will, established as a Will.

(c) [2 Add. 357. These principles have guided the decision of the court in *Brown v. Hallett*, 2 Lee, 418; *Sandford v. Vaughan*, 1 Phillim. 48; *Devereux v. Bullock*, 1 Phillim. 60; *Musto v. Satchiffe*, 3 Phillim. 104; *Boyle v. Mayne*, 3 Phillim. 504; *Forbes v. Gordon*, 3 Phillim. 614; *Roose v. Mouldsdale*, 1 Add. 129; *Lord J. Thynne v. Stanhope*, 1 Add. 52; *Antrobus v. Nepean*, 1 Add. 399; *Jameson v. Cooke*, 1 Hagg. 82; *Cundy v. Medley*, 1 Hagg. 140, 661, 671; *Theakston v. Marston*, 4 Hagg. 298.]

A Letter to
Attorney,
containing
Instructions
for drawing
a Will, esta-
blished as a
Will.

“ be possible to gain if I shou’d recover this illness & if fesable
“ with my inquiring & your help without great expence, but
“ that you will think it worth my while and as I have the real
“ Writings to produce and shall have more intelligence by a
“ Person that is going down that has an Estate lying near
“ Wooten Pilling that will send me a line that if such persons
“ as are nominated do possess and reside their I do hear the
“ Person that I did employ was comanded to see again as being
“ a very proper man & so great a Call as has been for He had
“ ben in the King of Prussias sevis and received a Shot thro his
“ wright arm and by that got his discharge which he shew’d
“ me—But in case of my demise I desire you will draw up and
“ leave some Blanks for some small legacies that after my Fu-
“ neral Charges are defrayed with decency then except some
“ legacies I give and bequeath to John Browning, Esq^{re} my
“ dear and well beloved Cousin my Lands and Tenements
“ Hereditaments att Wooten Pilling in the County of Bedford
“ and also a Message and Tenement lying in Bucklersbury
“ near the Mansion House in the City of London and you by
“ taking possession will find my Writings to prove and also
“ what Stock I shall have remaining in the said John Brown-
“ ing Esq^{re} Hands—I am

&c yours

CATH LLOYD

“ This you have under
“ my Hand, if any thing
“ should happen before the Writing
“ is drawn up”

“ If my assits will afford it to pay in the Burow of South-
“ wark £ and to Miss July Poney thirty Pounds Isaac
“ Apothecary a small debt to Wheeler Baker in S^t Thomas’s
“ a small debt to Remitt a Publican at the Red Lyon near the
“ Church half his debt a Poor Milkwoman in Kent Street
“ named Cater 1 ,, 1 ,, 0 These all by Legacy by way of com-
“ position and to Margaret Shaw my Room of Goods and
“ Sheets wearing aparell and all my best Linen Velvet Cloak
“ & Capuchin & to Mary Burke that is now with me Shifts
“ Bedgowns Petticoats & 5£ if she is with me at my depar-
“ ture—To M^{rs} Barnardi 30 Shillings for a Ring and to your
“ little Girl a little Cabinet & my Garnet Ring set with
“ Diamonds & a large Table Spoons but please not put this
“ Rigmaroll in till I send it correct—This only by way of
“ Memorandum in case I should go off suddenly—Mary Skee
“ something for she has used me ill”

This paper was written March 1760. Mrs. Lloyd died on the 2nd of August in the same year.

The Prerogative Court pronounced against this paper, as being a conditional paper; the operation of it depending on

the testatrix dying suddenly, whereas she had time to make a formal will; and parol evidence was admitted.

The Court of Delegates, Sir William Henry Ashhurst, Sir George Nares, Sir James Marriot, Dr. Macham, and Dr. Bever, reversed the sentence, and pronounced for the paper as the last will and testament of the deceased, thinking it a perfect paper and an absolute disposition (*d*).

Richard Griffin executed a testamentary paper, dated the 27th of September, 1777.

On the 18th of January, 1789, he began a paper, and having written no more than the commencement of what he meant to do, he was called away to dinner, and locked up the paper. On the 27th of the same month he died suddenly while sitting on the bench as a justice of peace.

The questions were, whether this unfinished paper was a revocation of the former paper executed in 1777; or whether it was to be established substantively and conjunctively with the former paper.

It was determined, that the unfinished paper could have no effect, the testator having lived eight days in health, and capable of business, after he had begun that paper; and not having concluded it, the presumption of law, even if there was no other paper, would have been, that he never meant to finish it; or that it was intended only as a draft for consideration; and the case was still stronger, as there was an executed paper (*e*).

Matthews v. Warner, M., 39 Geo. 3 (*f*). William Matthews, late principal storekeeper of his majesty's dock-yard at Deptford, died on the 8th of April, 1790, about the age of eighty; leaving the following testamentary papers:

" 2d Nov^r. 1785. A Plan of a Will proposed to be drawn
 " out as the last Testament of William Matthews, Storekeeper
 " of His Maj^{ty}s Yard at Deptford—After the usual Prelude,
 " being in Health, sound of Mind, &c. IMPRIMIS I give unto
 " Miss Issabella Johnson, Daughter of my good Friend Edw^d
 " Johnson, Esq.; of the Lottery Office, the Sum of Sixty
 " Pounds p^r Ann. for her natural Life, to be paid her Half-
 " yearly, out of the Dividends arising for Interest of the several
 " Navy Bills I have lately subscribed in the 5 p^r C^{ts} and Twenty
 " Pounds for Mourning, and also One Hundred Pounds to my
 " aforesaid good Friend M^r Johnson, if I die before him. After
 " the death of Miss Johnson, the Capital, with what other
 " the 5 p^r C^t Stock I may have, I bequeath to Holland Ann
 " L'Epine and Maria L'Epine, Sisters, Daughters of my good
 " Friend Edw^d L'Epine, Esq; in an equal Division between

An unfinished Testamentary Paper of no effect, the Party having lived eight Days afterwards.

An unexecuted Paper established as a Will by the Prerogative Court, Sentence affirmed by the Court of Delegates; a Commission of Review afterwards granted, and the Sentence reversed.

(*d*) *Habberfield v. Browning*, 4 Ves. jun. 200, n.

(*e*) *Griffin v. Griffin*, 4 Ves. jun. 197, n.

(*f*) 4 Ves. jun. 186, *et seq.* [See also *Walker v. Walker*, 1 Meriv. 503; and note to *Beaty v. Beaty*, 1 Add. 159.]

An unexecuted Paper established as a Will by the Prerogative Court, Sentence affirmed by the Court of Delegates; a Commission of Review afterwards granted, and the Sentence reversed.

“ them, and if one dies unmarried, the whole to descend to the
 “ Survivor, and if both dies unmarried, or without Children,
 “ to descend to the children of my First Cousin John Fisher
 “ Clerk, formerly of Bodmyn, Cornwall, and to my First Cousin
 “ Timothy Slade of Ledbury, to be divided equal between them.
 “ My Household Goods to be sold in Part, unless sufficient
 “ Monies can be found to pay my Debts and Legacies. My
 “ Plate, and what they choose to save of my Household Goods,
 “ I bequeath to Holland Ann L’Epine and her Sister Maria,
 “ to be divided between them; to whom I also leave all the
 “ Residue of my Fortune or Effects, after giving One Hundred
 “ Pounds to my good Friend Mr L’Epine, and also One Hun-
 “ dred Pounds to my late Son-in-Law Isaac Warner. Must
 “ pray my burial may be very plain and not expensive; could
 “ like to be buried, with the Warner’s Permission, with my
 “ dear Girl, in their Vault, Leigh Church, but by no Means to
 “ be buried at the Old Church, Deptford. I appoint my good
 “ Friend Mr Edw^d L’Epine and my good Friend Mr Edw^d
 “ Johnson, my Executors, to see this my last Will and Testa-
 “ ment complied with. Dated at Deptford, 2^d Oct^r 1785.

W^m MATTHEWS.

“ I must not forget my good
 “ Friends Miss Mary and Miss
 “ Charlotte Howell, who desire
 “ will accept of

“ Five Guineas each for Ring to wear in Remem-
 “ brance of me: 6th Oct^r. 1785. W^m MATTHEWS”

This paper was indorsed thus:

“ 2^d Oct^r 1785

“ A Plan designed for the last
 “ Will and Testament of
 “ Will^m Matthews, Store-
 “ keeper of His Maj^{ty}
 “ Yard,
 “ Deptford.”

The other paper was as follows :

“ 27th Dec^r. 1789.

“ Finding myself in a very precarious State of Health, the
 “ following is the Plan I propose to draw Will from, abrogat-
 “ ing all the others I have already drawn out. IMPRIMIS, I
 “ give to Miss Isabella and Catherine Jones, both of Eltham,
 “ One Thousand Pounds 5 p^r Cents. to be divided between
 “ them equally, being a legacy I always intended for their Aunt
 “ Isabella Johnson, for her great Friendship of her’s and her
 “ father’s always shewed towards me; to M^{rs}. Jones the Mo-
 “ ther of the Young Ladies, I bequeath One Hund^d 5 p^r C^{ts};
 “ to Isaac Warner, my late Son-in-Law, One Hundred; to
 “ Matthew, his Son and my Godson, One Hundred I give to
 “ Mr. John Clewer at Botley, and

The former of these papers was written on a piece of official paper intersected with lines, containing printed at the top the different articles, of which the deceased in his situation of store-keeper had the care; and the latter was on the back of a letter addressed to the deceased.

An unexecuted Paper established as a Will by the Prerogative Court, Sentence affirmed by the Court of Delegates; a Commission of Review afterwards granted, and the Sentence reversed.

Both of them were in the hand-writing of the deceased. The former was found in the deceased's office in the dock-yard, loose in his desk, in which there also appeared some official papers: the latter was found in the deceased's bureau in the parlour of his dwelling-house in the dock-yard, in a bundle of letters and papers.

Caveats were entered on the part of several persons, claiming as next of kin to the deceased, and of others, claiming as legatees under these instruments; and a suit was instituted in the Prerogative Court of Canterbury.

On the 8th of July, 1793, the judge of the Prerogative Court (*g*) pronounced against the validity of the paper, dated the 27th of December, 1789, and for the validity of the paper, dated the 2d of October, 1785, and of the codicil thereto, dated the 6th of that month.

Upon an appeal to the Court of Delegates (*h*) on behalf of Richard Matthews, one of the next of kin of the deceased, from that part of the sentence, which established the will and codicil, dated the 2d and 6th of October, 1785, the sentence was affirmed on the 10th of May, 1798.

A petition was presented to the king in council, on the part of the appellant, praying a commission of review; and by an order of council, dated the 31st of October, 1798, the petition was referred to the lord chancellor to report his opinion thereupon.

The commission of review was granted; and the former sentence of the Court of Delegates was reversed; and it was pronounced that the deceased had died intestate.

[Neither the consciousness of the testator that he has performed, nor his intention to perform, a testamentary act, are necessary to make it a valid instrument. The law is thus laid down by Sir John Nicholl in the case of *Masterman v. Maberley* (*i*): "In respect to personal property, where there is final intention proved and execution prevented by the act of God, the mere want of execution does not invalidate the instrument. The disposition intended to be made has the same legal effect, in regard to personal property, as if the instruments had been actually signed and attested. This non-execution does not in law affect the validity of these instruments as testamentary instruments applying to personal property. It is also settled law, and several cases have been decided, that if the

What makes a valid Testament.

(*g*) Sir William Wynne.

Dr. Swabey, Dr. Cook, and Dr. Parson.

(*h*) Sir Francis Buller, Sir Beaumont Hotham, Mr. Justice Heath,

(*i*) [2 Hagg. Rep. 247, 248.]

Testamentary
Instruments.

paper contains the disposition of the property to be made after death, though it were meant to operate as a settlement, or a deed of gift, or a bond; though such paper were not intended to be a will nor other testamentary instrument, but an instrument of a different shape; yet if it cannot operate in the latter, it may nevertheless operate in the former character.

[“Cases of Scotch conveyances, of deeds of gifts, and others of a similar nature, were cited in argument; and I will only mention a few in addition to them. In *Musgrave v. Down*, T. T., 1784, the assignment of a bond by endorsement,—in *Sabine v. Goate and Church*, 1782, receipts for stock and bills endorsed “Mrs. Sabine,”—in *Drybutter v. Hodges*, E. T., 1793, a letter,—in *Marnell v. Walton*, T. T., 1796, marriage articles,—in *Maxee v. Shute*, H. T., 1799, promissory notes, and notes payable by executors to evade legacy duty,—were held to be testamentary.

[“These are a few out of many cases that have occurred in the Prerogative Court; and, from the Reports both at common law and in equity, a variety of instances have been, and others might be, cited (*k*). So that it is a settled point, that the form of a paper does not affect its title to probate, provided it is the intention of the deceased that it should operate after his death. Here the intention of the deceased in respect to the disposition is beyond doubt; it is clear that he meant these daughters to have the additional 10,000*l.* each; he had proposed at first to effect this in the form of legacies in his will; but afterwards thought it would answer his purpose better to give those legacies in the form of bonds, and to omit them in the will; and these bonds therefore are to be considered as testamentary instruments, and the mere want of execution does not invalidate them; as that execution is shown to have been prevented alone by death.

[“The fair copy of the will and the bonds therefore taken together, though none of them are executed, contain, on the ordinary principles of the court, the will of the deceased as to his personalty. For it is clear that the execution was intended till the latest moment of his life, and that he would have executed the bonds as well as the will had he not been suddenly struck by death; nor is there any reason to suppose that he would have postponed that act till Atlee’s 30,000*l.* were paid and invested in the funds.”

[But it has never been decided that because an instrument is inoperative in the form given to it, it *must* be operative as a will. The same learned judge observed, in *The King’s Proctor v. Daines* (*l*)—

[“It is true that if, in point of form, it is drawn up as a deed, yet if it appears, from something in the instrument itself, that

(*k*) [See *Molineux v. Molineux*, Cro. Jac. 144.] (*l*) [3 Hagg. Rep. 220, 221.]

it was intended to convey a benefit upon and after death, it may, notwithstanding the apparent form, operate as a will; or if it is equivocal or silent, it may be proved by extrinsic circumstances, to have been intended to operate as a testamentary disposition. Most of the cases upon the subject are to be found referred to in *Thorold v. Thorold* (m), and in the subsequent case of *Masterman v. Maberly* (n). One or two additional cases have been referred to in the course of the discussion; but they do not appear to me either to carry further, or to alter, the principle which is laid down in those cases,—that the form of the instrument is not conclusive against its testamentary effect; that although it may not be valid in the form in which it was drawn up as a deed of gift, yet that it may operate as a will. But no case has gone the length of deciding, that because an instrument cannot operate in the form given to it, it *must* operate as a will;—it *may* operate as a will if shown to have been written with a testamentary intention.

[“If there is any proof, either in the paper itself, or from clear evidence *dehors*; first, that it was the intention of the writer of the paper to convey the benefits by the instrument which would be conveyed by it, if considered as a will; and secondly, that death was the event that was to give effect to it, then, whatever be its form, it may be admitted to probate as testamentary.”]

[There seems to be this distinction between papers which are in *their terms dispositive*, and those which are of an *equivocal* character,—the latter must be proved to be testamentary by the party claiming them, the former are entitled to probate unless they are proved *not* to have been written *animo testandi* (o).

[Several instruments of different kinds and forms may be taken together to constitute a will (p). Lord Hardwicke said the ecclesiastical courts would give probate of almost any paper writing (q): a deed-poll or an indenture (r), a deed of gift (s), a bond (t), marriage settlements (u), letters (x), drafts on bankers (y).

(m) [1 Phill. 1.]

(n) [Vol. ii. 225.]

(o) [See case last cited, and *Griffin v. Ferard*, 1 Curt. 100.]

(p) [*Sandford v. Vaughan*, 1 Phill. 39, 128; *Harding v. Bagshaw*, 2 Phill. 48; *Masterman v. Maberly*, 2 Hagg. 135.]

(q) [*Ross v. Ewer*, 2 Atk. 163.]

(r) [*Shingler v. Pemberton*, 4 Hagg. 356.]

(s) [*Thorold v. Thorold*, 1 Phill. 1, and the cases therein cited.]

(t) [*Masterman v. Maberly*, 2 Hagg. 235.]

(u) [*Passmore v. Passmore*, 1 Phil. 218; *In the goods of Knight*, 2 Hagg. 554.]

(x) [*Repington v. Holland*, 2 Lee, 106; *Passmore v. Passmore*, 1 Phill. 218; *Deny v. Barton*, 2 Phill. 575; *Manly v. Lakin*, 1 Hagg. 130; *In the goods of Dunn*, 1 Hagg. 488; *Masterman v. Maberly*, 2 Hagg. 347.]

(y) [*Bartholomew v. Henley*, 3 Phill. 317; *Gladstone v. Tempest*, 2 Curteis, 650. See also receipts for stock endorsed, &c.; see cases cited in *Masterman v. Maberly*, 2 Hagg. 247.]

When parol
Evidence is
admissible.

[In cases where the character of the instrument upon the face of it is equivocal, the case is opened to the admission of parol evidence of the testator's intention as to whether he considered it in the light of *memoranda* for a future will, or as his final disposition. In a court of probate the intention of the deceased is to be collected from all the circumstances of the will, and therefore an ambiguity on the *factum* of the instrument may be explained by extrinsic evidence (z). But it is a rule that in order to justify its admission, it must be proved—
1. That the ambiguity must be upon *the face of the paper*;
2. That the facts alleged and to be proved must *completely* remove that ambiguity (a).

[The cases cited in the last note seem to establish the proposition, that casual omissions in wills may be supplied, or sometimes insertions considered as not therein, and the wills so amended admitted to probate in two cases: when on the face of the will there is some absurdity or ambiguity which is palpably the consequence of the omission; and when there is clear proof that the insertion or omission was contrary to the intention of the testator (b). It must be remembered that omissions in the will can only be supplied by instructions reduced into writing during the lifetime of the testator. No mistake could otherwise be amended without a violation of the statute of frauds (c).

[The new Will Act (1 Vict. c. 26), takes away all such power from the court with respect to wills made since 1st Jan. 1838.—ED.]

Declarations
of Trust.

By the same statute of the 29 Car. 2, c. 3, s. 7, "All declarations or creations of trusts or confidences, of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing; or else they shall be utterly void, and of none effect."

Sect. 9. "And all grants and assignments of any trust or confidence, shall likewise be in writing, signed by the party granting or assigning the same by such last will or devise; or else shall be utterly void and of none effect."

Nuncupative
Will.

A nuncupative testament is, when the testator without any writing doth declare his will, before a sufficient number of witnesses (d).

(z) [*Greenough v. Martin*, 2 Add. 243; *Methuen v. Methuen*, 2 Phill. 246; *Lord St. Helen's v. Lady Exeter*, 3 Phill. 461.]

(a) [*Fawcett v. Jones*, 3 Phill. 434; *Draper v. Hitch*, 1 Hagg. 678; *Harrison v. Stone*, 2 Hagg. 550; *Shadbolt v. Waugh*, 3 Hagg. 570; *Sandford v. Vaughan*, 1 Phill. 128. As to what is an ambiguity on the face of the instrument, *Mitchell v. Mitchell*, 2

Hagg. 74; *Barwick v. Mullings*, 2 Hagg. 225; *Matthews v. Warner*, 4 Ves. 186; *Blackwood v. Damer*, 3 Phill. 458, n. (a); S. C. 3 Add. 239, note.]

(b) [*Bayldon v. Bayldon*, 3 Add. 232; *Travers v. Miller*, 3 Add. 226; and see Sir H. Jenner's remarks in *Castell v. Tagg*, 1 Curt. 298.]

(c) [*Rockell v. Youde*, 3 Phill. 141.]

(d) Swin. 58.

By the aforesaid statute, 29 Car. 2, c. 3, s. 19, "No nuncupative (e) will shall be good, where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by the oaths of three witnesses at the least, that were present at the making thereof; nor unless it be proved, that the testator at the time of pronouncing the same did bid the persons present or some of them bear witness that such was his will, or to that effect; nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his habitation or dwelling, or where he hath been resident for the space of ten days or more before the making of such will, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his dwelling."

Sect. 20. "And after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will."

Sect. 21. "And no letters testamentary or probate of any nuncupative will shall pass the seal of any court till fourteen days at the least after the decease of the testator be fully expired; nor shall any nuncupative will be at any time received to be proved unless process have first issued to call in the widow or next of kindred to the deceased, to the end they may contest the same if they please."

Sect. 23. "Provided that notwithstanding this act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his moveables, wages, and personal estate, as he might have done before the making of this act."

And by the 4 Anne, c. 16, "All such witnesses as are and ought to be allowed to be good witnesses upon trials at law, by the laws and customs of this realm, shall be deemed good witnesses to prove any nuncupative will, or any thing relating thereunto (f)."

By the Oaths of three Witnesses at the least.]—T., 1704, *Philips v. The Parish of St. Clement Danes* (g). Dr. Shallmer by will in writing gave 200*l.* to the parish of St. Clement Danes; and after Prew the reader coming to pray with him, his wife put him in mind to give 200*l.* more towards the charges of building their church; at which, though Dr. Shallmer was at first disturbed, yet afterwards he said he would give it, and bid Prew take notice of it; and the next day bid Prew remember what he had said to him the day before, and dies that day. Within three or four days after the doctor's widow put down a

(e) [See 2 Black. Comm. 501.] Lee, 343; *Bennet v. Jackson*, 1 Phill.

(f) [See *Freeman v. Freeman*, 1 190.]

(g) 1 Abr. Cas. Eq. 404.

Nuncupative
Will.

memorandum in writing of the said last devise, and so did her maid. Prew died about a month after; and amongst his papers was found a memorandum of his own writing, dated three weeks after the doctor's death, of what the doctor said to him about the 200*l.*, and purporting that he had put it in writing the same day it was spoken; but that writing, which was mentioned to be made the same day it was spoken, did not appear: and these memorandums did not expressly agree. About a year after, on application of the parish to the commissioners of charitable uses, and producing these memorandums and proofs by Mrs. Shallmer and her maid, they decreed the 200*l.* But on exception taken by the executors, the decree was discharged of this 200*l.*; and the lord chancellor held it not good, because it was not proved by the oath of three witnesses: for though Mrs. Shallmer and her maid had made proof, yet Prew was dead, and the statute in that branch requires not only three to be present, but that the proof shall be by the oath of three witnesses.

[The (1 Vict. c. 26) new Will Act renders all nuncupative wills invalid; but the 11th section provides, "that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this act."

[And it has been held that the term "mariner or seaman" includes every person in her majesty's navy, even superior officers being at sea (*h*); and that sect. 23 of the statute of frauds applies to *merchant* seamen (*i*). *Vide post*, "Seaman's Wills."

Rogatio Testium.

[The *rogatio testium*, that is, that the testator shall bid some of the persons present bear witness that such is his will, is an indispensable requisite for the validity of a nuncupative testament. The deceased must have called upon some of the persons present to bear witness to the act, not merely have declared, that he wishes such a disposition to be made of his effects (*k*). Nuncupative wills are not favoured by the ecclesiastical courts, who require a strict compliance with all the provisions of the statute of frauds before they admit such a will to probate—the *factum* of such a testament must be proved by evidence more stringent in every particular than that of a written one (*l*). Swinburne says that a nuncupative will may be made not only by the proper motion of the testator, but also at the interrogation of another (*m*).

[*In re Moresby*, where the testator made a written will in England, and afterwards a nuncupative one in Peru, not in conformity with the statute of frauds, it was said to be doubtful

(*h*) [*In the goods of Hayes*, 2 Curteis, 338.]

(*i*) [*Morell v. Morell*, 1 Hagg. 51.]

(*k*) [*Richards v. Richards*, 2 Lee, 588; *Bennett v. Jackson*, 2 Phill.

190, and the cases there cited by Sir John Nicholl.]

(*l*) [*Lemann v. Bonsall*, 1 Add.

389.]

(*m*) [Pt. 1, s. 12, pl. 6.]

whether such a will was governed by the 22d section, but the point was not decided (*n*). Sir George Lee said, in *Serocold v. Hunter and Hemming*, that it had been often held at the council board that the statute of frauds did not apply to the plantations (*o*). It has been held that the 22d section does not prevent a nuncupative disposition (made according to the restrictions of the statute) of a lapsed legacy (*p*); and that where part of personal estate had been disposed of by a written will, the residue might be left, if the executor was not altered, by a nuncupative will (*q*); and that where part of a written will had been obtained by force or fraud, the thing bequeathed by that part might be nuncupatively disposed of (*r*).—ED.]

Letters Testamentary or Probate of any Nuncupative Will.—H., 22 & 23 Car. 2, *Verhorn v. Brewin* (*s*). An administrator brought a bill to discover and have an account of the intestate's estate: the defendant pleaded, that the supposed intestate made a nuncupative will, and another person executor, to whom he was accountable, and not to the plaintiff as administrator. But decreed, that though there was such a nuncupative will, yet it was not pleadable against an administrator before it was proved.

[A disposition not valid, as nuncupative will, may sometimes be supported as a trust (*t*). Nuncupative wills have been subjected to peculiar regulations by the following statutes: 26 Geo. 3, c. 63; 32 Geo. 3, c. 34, s. 1; 11 Geo. 4, c. 20, s. 48—50; 2 & 3 Will. 4, c. 40, ss. 14, 15.—ED.]

Swinburne says (*u*), that a codicil, by intendment of law, is either to alter, explain, add or subtract something from the will; and wherever it is added to a testament, and the testator declares that it shall be in force, in such case, if the will happens to be void for want of those solemnities required by law, yet it shall be good as a codicil, and be observed by the administrator: it is true, executors cannot regularly be appointed in a codicil, but yet they may be substituted according to the will of the testator, and the codicil is still good. Codicil.

[And so Godolphin seems to consider a codicil as an *unsolemn* last will (*x*). Its derivation is clearly from *codicillus*, the diminutive of *codex*.—ED.]

M., 31 Car. 2, *Stoniwell's case* (*y*). The testator made his wife executrix and residuary legatee; but she dying in his lifetime, he by a codicil nuncupative devised to G. R. all which by will he had given to his wife, and died. The question was, whether this nuncupative codicil was good, notwithstanding

(*n*) [1 Hagg. 380.]

(*o*) [2 Lee, 494.]

(*p*) [*Robinson's case*, Raym. 334.]

(*q*) [*Ibid.*]

(*r*) [*Ibid.*]

(*s*) 1 Chan. Cas. 192.

(*t*) [*Nab v. Nab*, 10 Mod. 404; Gilb. Rep. Eq. 146.]

(*u*) [Part i. s. 5, pl. 2.]

(*x*) [Part i. c. 6, s. 2.]

(*y*) Raym. 334.

Codicil.

the statute before mentioned; and adjudged that it was, and as it were a new will for so much as he had given to his wife, and that it did not alter his written will, for there was no such will, the operation of it being determined by the death of the wife, living the testator, who was her husband.

Although no man can die with two testaments, because the latter doth alway infringe the former, yet a man may die with divers codicils, and the latter doth not hinder the former, so long as they be not contrary (z). All codicils are part of the will. Therefore a codicil merely for a particular purpose, as to change an executor, and confirming the will in all other respects, does not revive a part of the will revoked by a former codicil (a).

If two testaments be found, and it doth not appear which was the former or latter, both testaments are void; but if two codicils be found, and it cannot be known which was first or last, and one and the same thing is given to one person in one codicil, and to another person in another codicil; the codicils are not void, but the persons therein named ought to divide the thing betwixt them (b).

If codicils are regularly executed and attested, they may be proved as wills are. So if they are found written by the testator himself, they ought to be taken as part of the will, and to be proved in common form by the oath of the administrator with the will annexed; and in case of opposition, by witnesses to the handwriting and finding. And it hath been usual to exhibit an affidavit of the handwriting and finding, before a probate or administration passes even in common form.

[In the case of *Sherer v. Bishop* (c), the testator gave the residue of his personal estate among such of his relations only as were mentioned in that his will. He subsequently made a codicil, which he directed to be taken as part of his will; and another, by which he gave legacies to two of his relations, unaccompanied however by any such direction. It was held by Lord Commissioner Eyre (d), that as *every codicil was a part of the testamentary disposition, though not part of the instrument*, the relations named in the second codicil were entitled to a share of the residue. In *Fuller v. Hooper* (e), however, where a testatrix gave by will legacies to all her nephews and nieces, *except those thereafter named*, and desired her executors to look upon all memoranda in her handwriting as parts of or a codicil to her will, and then bequeathed the residue to the children of her sisters, and by a codicil bestowed legacies on some other nephews and nieces, Lord Hardwicke held, that the nephews and nieces mentioned in the subsequent part of the

(z) Swin. 15.

(a) *Crosbie v. M'Donal*, 4 Ves. 610.

(b) Swin. 15.

(c) [4 Bro. C. C. 55.]

(d) [Justices Ashurst and Wilson doubted.]

(e) [2 Ves. sen. 242.]

will, and not those mentioned in the codicil, were excluded from the first-mentioned legacies, because the lady meant to refer not to her will or testament, which takes in all the parts, but to the particular instrument. As to *revocation* of wills by codicil, *vide post*; as to the *republication* of wills, *vide ante*, “*Of what Things*.” Where there is a question, whether particular legacies given by a will are cumulative or substituted, it is often determined by the circumstances of the bequests having been given by distinct instruments (*f*). In such a case, *if probate has been granted, as of a will and codicil, this is conclusive of the fact of these being distinct instruments, though written on the same paper (g).*—ED.]

In the case of a real estate, a codicil cannot operate, unless it be executed according to the statute (*h*).

2. Donatio Causâ Mortis.

Donatio causâ mortis, or a gift in prospect of death, is where a man, moved with the consideration of his mortality, doth give and deliver something to another, to be his in case the giver die, but if he lives he is to have it again (*i*).

Donatio Causâ Mortis.

[“*Mortis causâ donatio est* (says Justinian) *quæ propter mortis fit suspicionem: cum quis ita donat, ut, si quid humanitùs ei contigisset haberet is qui accepit; sin autem super vixisset is, qui donavit, reciperet; vel si eum donationis poenituisset, aut prior decesserit is cui donatum sit (k).*”

[The cases reported in the text, and those cited in the note, establish the following propositions with respect to the essential characteristics of this species of bequest: 1. That the gift must be made by the donor in peril of death (*l*): 2. That the gift must be conditioned to take effect on the death of the

(*f*) [*Coote v. Boyd*, 2 Bro. C. C. 521; *Moggridge v. Thackwell*, 1 Ves. jun. 472.]

(*g*) [*Baillie v. Butterfield*, 1 Cox, 392; *vide post*, “*Probate*” and “*Payment of Legacies*.”]

(*h*) 1 Atk. 426.

(*i*) [Law of Test. 179; Prec. Cha. 269.]

(*k*) [Instit. l. 2, tit. 7, s. 1. “In a subsequent passage the whole doctrine on this head is thus summed up and expounded. ‘In summâ mortis causâ donatio est, cum magis si quis velit habere, quam eum, cui donet, magisque eum cui donat, quàm hæredem suum,’ and then the framers of the institutes, as if to adorn and illustrate the conclusions of law at which they had arrived, introduce into their work that remarkable passage from the Odyssey, in which Telemachus

(in reply to a question put to him by Piræus, whether he would wish the valuable presents he had brought with him from Lacedæmon to be removed to the palace from the place where they had been deposited) thus expresses himself:

Πείραί, οὐ γὰρ τ’ ἴδμεν ὅπως ἔσται τάδε ἔργα
Εἰ κεν ἐμὲ μνηστῆρες ἀγήνορες ἐν μεγάροισι
Λάβρη κτείναντες πατρῷα πάντα δάσονται,
’Αὐτὸν ἔχοντα σε βούλομαι ἐπαυρέμεν, ἢ τίνα
τῶνδε,
Εἶδε κ’ ἐγὼ τούτοις φόνον καὶ κῆρα φυτεύσω,
Δὴ τότε μοὶ χαίροντι φέρειν πρὸς δώματα
χαίρων.

Hom. Odyss. lib. 17, l. 79, et seq.”

[See *Thorold v. Thorold*, 1 Phillimore, 1.]

(*l*) [*Tate v. Hilbert*, 2 Ves. jun. 121; *Hedges v. Hedges*, Prec. Chan. 269; *Gardner v. Parker*, 3 Madd. 185; *Edwards v. Jones*, 1 Myln. & Cra. 236.]

*Donatio
Causâ Mor-
tis.*

donor (*m*). If, therefore, there be evidence in any case to make it appear that the gift was unconditional, it cannot be supported as a *donatio mortis causâ* (*n*). It should seem that where the nature of the thing admits of it, there must be an actual tradition of the thing itself to the donee (*o*), or to some one for the donee's use; but in both cases there must be an actual transfer of the thing (*p*). But if the nature of the thing will not allow it to be corporeally transferred, a delivery of the means to obtain possession of it—*e. g.* the key of a trunk or warehouse—will be sufficient (*q*).—ED.]

Thirdly, In every such gift there must be a delivery made by the party in his last sickness: and nothing can operate as such, without having been delivered in the testator's lifetime, by him or his order (*r*).

In *Blount v. Barrow* (*s*) Lord Commissioner Eyre was of opinion that it must appear to the court, that the gift was made in the *last illness* of the deceased; but a *donatio mortis causâ* may subsist, although the donor afterwards make a testament, without mentioning the gift (*t*).

In the case of *Smith v. Casen*, 8 Dec. 1718 (*u*), the Master of the Rolls, where jewels were given by the testator by way of *donatio causâ mortis*, doubted whether this was good against debts. And it seems not; they being given in case of the donor's death, and in nature of a legacy, which therefore would be fraudulent as against creditors.

T., 13 Geo. 3, *Thompson v. Batty* (*x*). An executor libelled in the spiritual court, for taking a tankard without his consent, on pretence that the testator gave it to the defendant if he died of his then sickness. And the court granted a prohibition; this not being a legacy, but a donation in prospect of death, the validity whereof may be tried in action of trover.

For this is a matter of which the common law takes notice, and need not be proved in the ecclesiastical court (*y*).

If a defendant be examined to charge him with the receipt of property, his evidence is admissible to establish a gift in contemplation of death; but the Court of Chancery, where doubtful, has directed an issue to ascertain the fact (*z*).

(*m*) [*Tate v. Hilbert*, 2 Ves. jun. 231.]

120; *Irons v. Smallpiece*, 2 B. & A. 553; *Gardiner v. Parker*, 3 Madd. 184.]

(*n*) [*Walter v. Hodge*, 1 Wils. C. C. 445; 2 Swanst. 92; *Edwards v. Jones*, 1 Myl. & Cra. 226, per Lord Cottenham, Chancellor. The latest case on this subject.]

(*o*) [*Ward v. Turner*, 2 Ves. sen. 431; *Bryson v. Brownrigg*, 9 Ves. 1; *Bunn v. Markham*, 7 Taunt. 224; *Irons v. Smallpiece*, 2 B. & A. 553.]

(*p*) [*Drury v. Smith*, 1 P. Wms. 404; *Bunn v. Markham*, 7 Taunt.

(*q*) [*Ward v. Turner*, 2 Ves. sen. 441; *Jones v. Selby*, Prec. Chanc. 300; *Smith v. Smith*, 2 Stra. 955; *Bunn v. Markham*, 7 Taunt. 324.]

(*r*) *Miller v. Miller*, 3 P. Will. 357.

(*s*) 2 Ves. jun. 546.

(*t*) *Hill v. Chapman*, 2 Bro. 612.

(*u*) 1 P. Will. 106.

(*x*) Str. 777.

(*y*) 1 P. Will. 441; Sel. Cas. in Chan. 14.

(*z*) *Blount v. Burrow*, 1 Ves. jun. 546.

A man by his will disposed of personal estate; and afterwards by parol gave 100*l.* bill to one to deliver over to his nephew, if the testator should die of that sickness. And this gift was held good (a).

*Donatio
Causâ Mor-
tis.*

So where the husband upon his death-bed delivered to his wife a purse of 100 guineas, bidding her apply to no other use than her own (b).

So where the husband upon his death-bed drew a bill on his goldsmith, to pay his wife 100*l.* for mourning (c).

[It has been said that a delivery of the *means* to obtain possession of a thing is sometimes tantamount to the delivery of the thing; so a bond may be the subject of a *donatio mortis causâ*.—ED.]

March 11, 1744, *Baily v. Snelgrove* (d). Mrs. Baily going out of town in a bad state of health, gave her maid a bond executed to her by a third person, saying, If I die, it is yours. She died intestate. The administrator brought a bill to have the bond delivered up. But by the lord chancellor, Hardwicke: this is a sufficient *donatio causâ mortis* to pass the equitable interest of this bond upon the intestate's death (e). The question in this case was, whether the nature of the property was capable of being so given. His lordship held it might, as well as a specific chattel; though no legal property passed thereby, nothing but the paper, a bond being evidence of a debt, and the intent being to give the debt, not the paper, he held it a good donation *mortis causâ*, comparing it to the property which passes by assignment of a bond, which passes nothing in point of law, and the assignee must make use of the other's name for recovering on it. He put the case, that if a chattel in possession had been bought by the intestate, and a bill of sale made to a trustee for her use, the property would have been in the trustee, and the equitable interest in the *cestui que trust*, who, if she had given this chattel so circumstanced to the defendant, it would have been good.

But in the case of *Ward v. Turner*, July 20, 1752 (f), it was held by Lord Hardwicke, that a delivery of receipts for South Sea annuities was not sufficient (though there was strong evidence of the intent); and that it could not be done without a transfer, or something amounting to that; and all the anxious provisions of the statute of frauds will signify nothing, if donation or stock, attended only by delivery of the paper, is

(a) *Drury v. Smith*, 1 P. Will. 404.

(b) *Lawson v. Lawson*, 1 P. Will. 441.

(c) *Ibid.*

(d) 3 Atk. 214; 2 Ves. 432.

(e) It was ruled *contra* by Sir Joseph Jekyl, M. R. as to a note for 100*l.*, it being a chose in action. *Miller v. Miller*, 3 P. Will. 356.

How far a chose in action may be willed, *vide ante*, "Of what Things."

(f) 2 Vesey, 431. See also *Milles v. Milles*, 3 P. Wms. 356; *Hill v. Chapman*, 2 Bro. C. C. 612; *Jones v. Selby*, Prec. Chan. 300; *Richard v. Symes*, Barnard. C. C. 90; *Hurst v. Beech*, 3 Modd. 351; *Hassel v. Tynte*, Ambl. 318.

*Donatio
Causâ Mor-
tis.*

allowed. It might be supported to the extent of any given value, and would leave these things under the greatest degree of uncertainty, and amount to a repeal of that useful law as to all this part of the property of the subjects of this kingdom. Therefore, notwithstanding the strong evidence of the intent, this gift of annuities is not sufficiently made within the rules of the authorities. And considering how much of the personal estate of this kingdom is now vested in stocks and funds, his lordship said he was of opinion not to carry it further.

Need not be
proved.

[A *donatio mortis causâ* need not be proved in the ecclesiastical court; for it is a gift which takes effect from delivery. It requires no assent on the part of the executor or administrator, nor have they any right or title to interfere with it (*g*).

A Legacy
under.

[A legacy under a nuncupative will must be recovered from the executor; a *donatio mortis causâ* against him (*h*). And *donationes mortis causâ* are legacies within the intent and meaning of 36 Geo. 3, c. 52, s. 7.—ED.]

3. Appointing Guardians.

Appointing
Guardians.

Dr. Swinburne says (*i*), By general custom observed within the province of York, the father by his last will or testament may for a time commit the tuition of his child and the custody of his portion; which testament and assignation is to be confirmed by the ordinary, who also is to provide for the execution of the same testament.

And if the father die, no tutor being by him assigned, and the mother do in her last will and testament appoint a tutor, the same will is to be proved, and the assignation of the tutor confirmed (*k*).

And if no tutor be assigned by either of the parents, then may a stranger, if he make the orphan his executor, and give him his goods, assign a tutor unto him, with respect to such goods; which tutor is by the ordinary to be confirmed (*l*).

And if there be no tutor testamentary at all, then may the ordinary commit the tuition of the child to his next kinsman demanding the same, according as in administrations where any dieth intestate (*m*).

And by the said custom a tutor may be assigned to a boy at any time until he hath accomplished the age of fourteen years, and to a girl until she hath accomplished the age of twelve years. But after those years, he or she respectively may choose their own curators. But if they do not elect any other curator after their several ages, then he that is assigned in the will is to be confirmed curator to either of the said children,

(*g*) [*Thompson v. Hodgson*, 2 Stra. 777; *Tate v. Hilbert*, 2 Ves. jun. 120.]

(*h*) [As to other common law incidents, see Mr. Vaughan Williams on Executors and Administrators,

vol. i. p. 617.]

(*i*) Swin. 210.

(*k*) Ibid.

(*l*) Ibid.

(*m*) Ibid. 211.

albeit he were above fourteen years, and she above twelve, when the will was made (*n*). And this is according to the rules of the civil law; but, by the common law, the age of choosing guardians both as to the male and female is the age of fourteen (*o*).

And by the said general custom observed within the province of York, a tutor may be assigned either simply or conditionally, and until a certain time, or from a certain time. But no tutor may intermeddle as tutor, until he be confirmed by the ordinary, albeit he be assigned tutor simply; much less where he is assigned conditionally, or from a certain time, may he intermeddle as tutor, until the condition be extant, or time limited be expired. But the ordinary may in the mean time commit the tuition; and he that is so appointed by the ordinary, may for that time administer (*p*). [There seems to be a conflict of opinions as to whether fourteen for males, and twelve for females, are the ages selected by the law as the ages when infants may choose guardians (*q*).—ED.]

But, more generally, by the statute of the 12 Car. 2, c. 24, s. 8, (which controlleth the aforesaid custom in divers instances), "Where any person shall have any child or children under the age of twenty-one years, and not married, at the time of his death, it shall be lawful for the father of such child or children, whether born at the time of the decease of such father, or at that time in *ventre sa mere*, or whether such father be within the age of twenty-one years or of full age, by his deed executed in his lifetime, or by his last will and testament in writing, in the presence of two or more credible witnesses, in such manner, and from time to time, as he shall think fit, to dispose of the custody and tuition of such child or children during such time as he or they shall respectively remain under the age of twenty-one years, or any lesser time, to any person or persons, in possession or remainder, other than popish recusants; and such person to whom the custody of such child shall be so disposed or devised, may maintain an action of ravishment of ward or trespass, against any person who shall wrongfully take away or detain any such child, for the recovery of such child, and recover damages for the same in the same action, for the use and benefit of such child."

Guardians by Statute.

Sect. 9. "And such person to whom the custody of such child shall be so disposed or devised, may take into his custody to the use of such child, the profits of all lands, tenements and hereditaments of such child, and also the custody, tuition and management of the goods, chattels, and personal estate of such child, till his or her age of twenty-one years, or any lesser time, according to such disposition aforesaid; and may bring such

(*n*) Swin. 212.

(*o*) 1 Inst. 78.

(*p*) Swin. 215.

(*q*) [Vaughan Williams on Ex. & Ad. vol. i. p. 13, n. (*f*).]

actions in relation thereto, as by law a guardian in common socage might do (r)."

Sect. 10. "Provided, that this shall not extend to alter or prejudice the custom of the city of London, nor of any other city or town corporate, or of the town of Berwick upon Tweed, concerning orphans."

Before this the 4 & 5 Ph. & Mar. enacted as to female children, "That it shall not be lawful to any person or persons to take or convey away, or cause to be taken or conveyed away, any maid or woman child unmarried, being under the age of sixteen years, out of or from the possession, custody or governance, and against the will of the father of such maid or woman child, or of such person or persons to whom the father of such maid or woman child by his last will and testament, or by any other act in his lifetime, hath or shall appoint, assign, bequeath, give or grant the order, keeping, education, or governance of such maid or woman child, except such taking and conveying away as shall be had, made or done, by or for such person or persons as without fraud or covin be or then shall be the master or mistress of such maid or woman child, &c. under penalty of two years' imprisonment or such fine as shall be assessed by the queen's council in the star chamber; and if he deflower or marry such child, to be imprisoned for five years, or pay such fine as shall be assessed as aforesaid."

Several
Kinds of
Guardians.

Of the several species of guardians, the first are guardians *by nature*, namely the father, and (in some cases) the mother of the child. For if an estate be left to an infant, the father is by common law the guardian, and must account to his child for the profits. There are also guardians *for nurture*; which are, of course, the father or mother, till the infant attains the age of fourteen years; and in default of father or mother, the ordinary usually assigns some discreet person, to take care of the infant's personal estate, and to provide for his maintenance and education. Next are guardians *in socage*, who are also called guardians *by the common law*. These take place only, when the minor is entitled to some estate in lands; and then, by the common law, the guardianship devolves upon his next of kin, to whom the inheritance cannot descend. These also, like guardians for nurture, continue only till the minor is fourteen years of age; for then, in both cases, he is presumed to have discretion, so far as to choose his own guardian (s).

Guardians in
Chivalry.

Heretofore there was also a guardian *in chivalry*, which was where the tenant by knight's service died, his heir male being under twelve years of age, in such case the lord should have the land holden of him until the heir should attain the age of

(r) See the clauses of this statute ranged under six different heads by Mr. Fonblanque in his notes to Treat. on Eq. vol. ii. p. 294.

(s) 1 Black. 461. For the various sorts of guardians see Mr. Hargrave's notes to Co. Lit. 88 B.

twenty-one, and likewise the marriage of the heir, if he was unmarried at the death of his ancestor; if there was an heir female under the age of fourteen, and unmarried, then the lord had the wardship of the land till her age of fourteen, and was to tender to her covenable marriage without disparagement. And this sort of guardianship was a kind of dominion of lords over their tenants, and was introduced among the Gothic nations, to breed them to arms, but is now fallen with the tenures; for by the 12 Car. 2, c. 24, all tenures by knight's service and *in capite* are taken away and turned into free and common socage (*t*).

Guardians appointed by the spiritual court are only for the personal estate. [The statute 38 Geo. 3, c. 87, after reciting that inconveniences arose from granting probates to minors, enacts by section 6, "that where an infant is sole executor, administration, with the will annexed, shall be granted to the guardian of such infant, or to such other person as the spiritual court shall think fit, until such infant shall have attained the full age of twenty-one years, at which period, and not before, probate of the will shall be granted to him." And by section 7, "that the person to whom such administration shall be granted shall have the same powers vested in him as an administrator now hath by virtue of an administration granted to him *durante minore ætate* of the next of kin." *Vide post*, "*Administration*."—ED.]

Appointed by
Spiritual
Court.

Where an In-
fant is sole
Executor,
Administra-
tion to be
granted to
the Guardian,
&c. who shall
have the same
Power as
where Ad-
ministration
is granted *du-
rante minore
ætate* of the
Next of Kin.

Guardians for the real estate were heretofore under the direction of the Court of Wards and Liveries, which court being taken away by this statute, power is given by the same statute to the father by his deed or will to appoint guardians; which if he shall not do, or if the guardians appointed by him shall die or refuse to act, then the power devolveth upon the High Court of Chancery, the lord chancellor (under the king) being the supreme guardian of all infants and others not capable to act for themselves. In the case of *Whitfield v. Hales*, the lord chancellor made an order for a guardian and maintenance, on the ground of ill-treatment by the father (*u*).

In the case of *Buck v. Draper*, March 26th, 1747 (*x*), a petition was preferred to the Lord Chancellor Hardwicke by the mother of the infant, to discharge an order of the Master of the Rolls, appointing the plaintiff guardian of her daughter, upon an allegation of his unfitness, as being disordered in his mind, and that she, the mother, had long before been appointed guardian of her daughter by the ecclesiastical court at York,

By Custom
of York.

(*t*) 1 Inst. 74, 87, 88.

(*u*) 12 Ves. 492.

(*x*) 3 Atk. 631. This is one instance, amongst many others, of the perpetual jarring between the two jurisdictions. The ecclesiastical judge, probably in answer to such *quo war-*

ranto, would return the custom within the province of York, as is here above set forth from Swinburne; which custom existed long before there was any Court of Chancery in this kingdom. Barn.

and had by virtue of that appointment taken possession of the infant's person and estate. The lord chancellor dismissed the petition with costs, the facts of the lunacy being not at all made out, and said he was surprised upon what pretence the ecclesiastical courts in the country take upon them to appoint guardians *ex officio*, without any suit instituted for that purpose, and by this means break in upon the jurisdiction of this court with respect to the guardianship of infants, and said, he recommended it to the attorney-general to consider whether a *quo warranto* might not issue to the ecclesiastical court upon such an extrajudicial appointment of guardians to infants, where no suit at all is depending for this purpose.

It shall be lawful for the Father.—By the common law, before this act, it was not lawful for the father to appoint a guardian either in chivalry or socage; but the law appointed one for him: and in such case the guardian appointed by the law could not refuse; but the guardian appointed by the father, under the statute, may refuse, if he pleaseth (*y*).

For the Father.—Therefore the act only authorised the father, and not the mother, although she hath the same concern for her heir as the father. And as the father only can appoint a guardian, so therefore the guardian appointed by him cannot appoint another guardian: for it is a personal trust, and not assignable, any more than guardianship in socage (*z*).

By Statute.

In the case *Ex parte Edwards*, June 18th, 1747 (*a*), the mother by her will appointed a guardian to her son till his age of twenty-one. An application was now made to the court for maintenance, and in case they should not approve of the guardian appointed by the mother, that a new one may be assigned. By Lord Hardwicke: "The statute confines the power of appointing a testamentary guardian to the father only; and therefore the appointment by the mother is absolutely void. And the infant being of the age of fourteen, chose a guardian in court."

But here being no negative words, this altereth not the custom within the province of York (as hath been expressed), for the mother by her will to appoint a guardian, that is, with respect to the personal estate; for unto that only the custom must be understood to extend; for when that custom first took place, the law itself appointed guardians for the real estate in chivalry or in socage.

In Ventre sa Mere.—In the case *Ex parte the Earl of Ilchester*, the testator married, but not then having children, gave the guardianship of all his daughters born or to be born, to his wife, and of all his sons hereafter to be born, to his wife and his brother, or the survivor; it was held that the guardianship extended to all the children by that or a future mar-

(*y*) Vaugh. 182. (*z*) *Bedell v. Constable*, Vaugh. 179. (*a*) 3 Atk. 519.

riage (b). In like manner, by the custom within the province of York, a tutor may be assigned to a child that is not born, as also to an idiot or lunatic (c).

But this statute gives no power to the father to appoint a guardian to his child, being an idiot or a lunatic, after he shall be of the age of twenty-one years. The care of lunatics devolves on the crown, who generally commits it to the lord chancellor (d).

Whether such Father be within the Age of Twenty-one Years or of full Age.]—Therefore the father, under the age of twenty-one, may grant the custody of his heir; but he cannot demise or devise his land in trust for him directly; but he may do it obliquely; for by appointing the custom, the land follows as an incident given by the law to attend it (e).

By his Deed executed in his Lifetime, or by his last Will.] In the case of *The Earl of Shaftesbury v. Hannam* (f), where the father had given the guardianship of the infant to one by deed, and to the mother by will, it was decreed that the will was a revocation of the deed. In the case *Ex parte the Earl of Ilchester*, it was deemed that a testamentary appointment of guardian was not revoked by a subsequent testamentary appointment, not executed according to the statute, and not directly importing a revocation (g).

By his last Will.]—And such will need not to be proved in the spiritual court (i): that is to say, if the will is merely upon this statute for the appointing a guardian and nothing else; for in such case, the appointment being solely by act of parliament, the temporal courts shall be judges thereof. But in the same will, if there is any disposition of the personalty (as is most commonly the case), it seemeth that the will shall be proved in the spiritual court for the whole; which probate shall be effectual so far as the personalty is concerned, although it shall be of no avail with respect to such particular appointment of a guardian by the statute. Also this consideration shall not be extended to take away any power from the spiritual court which it had before, as particularly within the province of York (as before mentioned) or within any of the places specially excepted by the statute.

In such Manner, and from Time to Time, as he shall think fit.]—It seemeth not to be material by what words the tutor is appointed, so that the testator's meaning do appear. Wherefore if the testator say, "I commit my children to the power of such a one;" or "I leave them in his hands;" it is in effect as if the testator had said, "I make him tutor to my children."

(b) 7 Ves. 348.

(c) Swin. 212.

(d) As to the rules by which their property is managed, see *Oxendon v. Lord Compton*, 2 Ves. jun. 69; and 4 Bro. 231.

(e) Vaugh. 178.

(f) Chan. Ca. Finch, 323.

(g) 7 Ves. 348.

(h) [*Vide post*, 1 Vict. c. 26, s. 1, New Will Act.]

(i) 1 Vent. 207.

So it is if he say, "I leave them to his government, regimen, administration," or the like. For in all things the will and meaning of the testator is to be observed and preferred before the propriety of the words whereof perhaps he is ignorant; which meaning is to be collected by that which went before or followeth in the will, and by other circumstances, which the judge ought to inquire (*i*).

Under the Age of Twenty-one Years, or any lesser Time.]—And if the infant marries in the mean time, this shall not dissolve the guardianship (*k*).

Or any lesser Time.]—If a man deviseth the custody of his heir apparent, and no time is mentioned, yet it is a good devise of the custody within the act, if the heir be under fourteen at the death of the father; because by the devise the guardianship is changed only as to the person, and left the same as to the time. But if the heir be above fourteen, then the devise is void for the uncertainty; for the act did not intend every heir should be in custody till twenty-one, but only so long as the father shall appoint, not exceeding that time (*l*).

Duty of
Guardians.

To any Person or Persons in Possession or Remainder, other than Popish Recusants.]—Yet there are other exceptions: as by the 9 & 10 Will. 3, c. 32, persons denying the Trinity, or asserting that there are more Gods than one, or denying the Christian religion to be true, or the Holy Scriptures to be of divine authority, shall for the second offence be disabled to be guardians.

And by the statutes relating to the qualification for offices, persons executing their respective offices without taking the oaths and performing the other requisites for their qualification, shall be disabled to be guardians.

Also, in general, he that cannot be an executor cannot be a guardian (*m*).

May maintain an Action of Ravishment of Ward.]—The ecclesiastical court cannot intermeddle with the *body*, although the parents make no disposition thereof (*n*).

But by the express words of this act, the guardian by will takes place of all other guardians; and the guardian under this statute may have ravishment of ward, as the guardian by knight's service or in socage at common law might have had (*o*).

May take into his Custody to the Use of such Child.]—This guardian being made after the model of a socage guardian, and coming in the place of the father, hath not a bare authority, but an interest; but it is only an interest joined with his trust (as being necessary in order to the performance of the trust), but not an interest for himself (*p*).

(*i*) Swin. 216.

(*k*) 3 Atk. 625.

(*l*) Vaugh. 184.

(*m*) Swin. 211.

(*n*) 3 Keb. 834.

(*o*) 3 Keb. 528; 2 P. Will. 115.

(*p*) Vaugh. 181, 183; 2 P. Will. 122.

The Profits of all Lands.—A guardian by nurture, being so appointed by the testator's will, can only lease at will, and not for any number of years; for the guardian himself (except he be guardian in socage) is only tenant at will (q).

In the case of *Roe on the Demise of Parry v. Hodgson*, T., 33 Geo. 2 (r), upon a case stated for the opinion of the Court of Common Pleas, the principal question was, whether a lease for twenty years made by the testamentary guardians of an infant, Mr. Spencer, was absolutely void or only voidable. It appeared that Mr. Spencer himself had done no one act since he came of age, either towards establishing the lease (supposing it voidable) or to avoid it. Upon the first argument, the court agreed in one point, viz. that a testamentary guardian by statute till an infant was twenty-one years of age, and a guardian in socage till an infant was fourteen, were the same; and therefore whatever interest the latter had in lands till the infant was fourteen, the guardian by statute has the same until he is twenty-one. As to the main question, whether the lease was void or only voidable, they doubted much, and took further time to consider; and at last they resolved unanimously, that a guardian of an infant cannot make a lease of the infant's lands, and that the lease in this case was absolutely void.

Of all Lands, Tenements, and Hereditaments of such Child.—It seemeth that this guardian shall have the custody, not only of lands descended or left by the father, but of all lands and goods any way acquired or purchased by the infant (which the guardian in socage had not), which proves that he derives not his interest from the father, but from the law; for the father could never give him power or interest of or in that which was never his (s).

And also the Custody, Tuition, and Management of the Goods.—Swinburne says (t), the office of a tutor is to provide that his pupil be honestly and virtuously brought up, and to provide for him meat, drink, clothes, lodging, and other necessities, according to the child's estate, condition and ability.

And the same also doth farther consist in the good and faithful administering or disposing of the goods and chattels of the said pupil, that is to say, the tutor may not commit any thing that may be hurtful, nor omit any thing that may be profitable to his pupil, and in the end must restore unto his pupil all his goods and chattels by him the said tutor before received; and for that purpose every tutor ought, even at the very entry into his office, to make a true inventory of all the goods and chattels of his pupil, and to make a just and true account of his dealings in behalf of his pupil: and it is generally observed within the said province of York, that every tutor, as well

(q) Cro. Eliz. 678, 734; 8 Mod. 312.

(r) 2 Wilson, 129, 135.

(s) 2 P. Will. 185.

(t) Swin. 217.

testamentary as other appointed by the ordinary, doth enter into bond with sureties to the effect aforesaid, according to the discretion of the ordinary (u).

The tutor may sell such goods belonging to the pupil as cannot be kept until he come to lawful age. But other goods which may conveniently be kept, and especially goods immoveable, the tutor may not sell, unless otherwise ordered by will (x).

More particularly, the guardian ought to apply the estate in his hands to pay the *debts* of the infant (y).

He may pay off the *interest* of any real incumbrance, and the *principal* of a *mortgage*; because it is an immediate charge on the land; but no other real incumbrance (z).

In the case of *Waters v. Ebral*, H., 1707 (a), where the mother, as guardian, received the rents of the estate, and paid off specialties, but took assignment, and after the death of the infant brought a bill against the heir for a discovery of assets by descent (she claiming the rents received as administratrix), it was held by the court, that the guardian is not compellable to apply the profits of the estate of the infant to pay off the *bond* debts of the ancestor.

In the case of the *Earl of Winchelsea v. Norcliffe*, T., 1686 (b), a guardian, having a considerable sum of money in his hands, laid it out in a *purchase* of lands for the benefit of the infant, if when he came of age he should agree to it; the infant dying in his minority, it was decreed that the guardian should account for the money to the administrator of the infant; for that he could not, without the direction of the court, convert the personal into real estate.

M., 35 Cha. 2, *Osborn v. Chapman* (c). A guardian, at the request of one who was going to marry the ward, gave in an account of the estate to the intended husband, and secured to him the balance by three several bonds; and the intended husband gave a bond to the guardian to release all accounts to him after the marriage: the marriage was had; the guardian paid the balance; but the husband gave no release, but sued for an account and relief against the bond. And the guardian was ordered to answer the bill; for the account was made when the intended husband had no title; no release was given; and the pursuit is fresh.

For by Cowper, Lord Chancellor: Wherever a father, mother, or guardian, insists upon private gain, or security for it, and obtains it of the intended husband, it shall be set aside (d).

(u) Swin. 217.

(x) Ibid.

(y) 1 Cha. Ca. 157.

(z) Prec. Cha. 137.

(a) 2 Vern. 606.

(b) 1 Vern. 403, 435.

(c) 2 Cha. Ca. 157.

(d) 1 Salk. 158; 2 Vern. 652.

For marriage brocage agreements have been often condemned in equity. And a bond to give money, if such a marriage could be obtained, is ill. And so is a bond to forgive a sum of money. For such bonds, although good at law, yet being introductive of infinite mischief, have upon great consideration been condemned in equity (*e*).

If the consideration of such a bond is void as contrary to general policy, upon the principles laid down by the Court of C. B. in *Collins v. Blantern* (*f*), it might be pleaded at law.

But a guardian, upon account, shall have allowance of all reasonable costs and expenses in all things (*g*).

And if he receive the rents and profits, and be robbed, without his default or negligence, he shall be discharged thereof (*h*).

By the statute of the 4 Ann. c. 16, actions of account may be brought against the executors or administrators of guardians.

By the 6 Ann. c. 18, s. 5, any person who, as guardian or trustee for any infant, shall hold over after the determination of the particular estate, without consent of the person next entitled, shall be adjudged a trespasser, and shall pay damages to the value of the profits received.

By the 7 Ann. c. 19, infants seised or possessed of lands in trust, or by way of mortgage, shall and may, on direction of a court of equity, signified by an order made on hearing all parties, on petition of the person for whom such infant shall be seised in trust, or the mortgagor, or guardian of such infant, convey and assure the said lands, as such court shall direct.

By the 29 Geo. 2, c. 31, guardians, on application to a court of equity, may obtain an order for infants to surrender leases, in order to accept new ones.

And by the 26 Geo. 2, c. 33, guardians may consent to the marriage of such infants.

And may bring such Actions in relation thereto as by Law a Guardian in Common Socage might do.—And he may also submit matters to arbitration; for though the infant cannot submit to an award, yet the guardian may do it for him, and bind himself that the infant shall perform it (*i*).

An infant may sue either by his guardian or next friend; but must defend by his guardian (*j*).

And if an infant refuseth to name a guardian to appear by, the plaintiff, by order of court, may do it for him (*k*).

And the *prochein amy*, or next friend, need not to be a relation; but he must be a person of substance, because liable to costs (*l*).

(*e*) 3 P. Will. 394; Ibid. 76; and see *Herrington v. Du Chatel*, 1 Bro. 124.

(*f*) 2 Wils. 347.

(*g*) Litt. sect. 123.

(*h*) 1 Inst. 89.

(*i*) Comb. 318.

(*j*) Cro. Ja. 641.

(*k*) Str. 1076.

(*l*) 1 Atk. 570.

And when an infant brings an action by his guardian, the warrant for him to appear by guardian ought to be entered upon record, because it is the act of the court; for the court takes care of infants, that none shall sue for them but those that are responsible; for if the infant be prejudiced, he may have this action against him (*m*).

But the suit is not in the name of the guardian, but of the infant; for at this day a guardian doth not act in any cause for a minor in his own name, as guardian, but the minor acts in his own name by his guardian (*n*).

Guardians to
Natural Chil-
dren.

Though, strictly speaking, testamentary guardians cannot be appointed to natural children, yet on the petition of the infant, and the consent of the guardians named by the putative father, the Court of Chancery will appoint them, without reference to the master (*o*). And in *Rex v. Cornforth* (*p*), the Court of King's Bench granted an information against the defendant for taking away a natural daughter under sixteen from under the care of her putative father, being of opinion this was within section 3 of 4 & 5 Phil. & Mar. c. 8.

[For further information on this subject, see Bacon's Abridgment, title Guardians.—ED.]

4. Appointing of Executors.

Appointing
of Execu-
tors (*q*).

By the 9 & 10 Will. 3, c. 32, persons denying the Trinity, or asserting that there are more Gods than one, or denying the Christian religion to be true, or the Holy Scriptures to be of divine authority, shall for the second offence be disabled to be executors. [Repealed, as far as denying the Trinity, by 53 Geo. 3, c. 160, s. 1.—ED.]

By the 5 Geo. 3, c. 27, artificers going out of the kingdom, and exercising their trades in foreign parts, shall be incapable of the office of executor. [Repealed by 5 Geo. 4, c. 97.—ED.]

And by the acts for the qualification for offices, persons not having taken the oaths and performed the other requisites for qualifying, who shall execute their respective offices after the time limited for their qualification shall be expired, shall be disabled to be executors. [These acts are 25 Cha. 2, c. 2; 1 Geo. 1, stat. 2, c. 13; 13 Will. 3, c. 6, s. 6; but see 9 Geo. 4, c. 17.

[By 3 Jac. 1, c. 5, s. 22, and 3 Car. 1, c. 2, s. 1, Popish recusants and persons abetting the foreign Popish education of British subjects, were incompetent to be executors; but by 31 Geo. 3, c. 32, they are exempt from this disability, upon subscribing the declaration and oath of allegiance, &c. as

(*m*) Ld. Raym. 232.

(*n*) 1 Ought. 337, 359.

(*o*) *Ward v. St. Paul*, 2 Bro. 583.

(*p*) 2 Stra. 1162.

(*q*) [See on this subject, Godolph.

pt. ii. c. 1, s. 1; Swinb. pt. vi. s. 1;

Wentw. Office of Executor, c. 1;

Vaughan Williams on Ex. and Adm.

vol. i. book iii. p. 161, 3rd ed.—ED.]

appointed by that act (*r*). And the effect of sect. 3 of 53 Geo. 3, c. 127, must be that excommunicated persons may be executors.—ED.]

An *infant* may be made executor, how young soever he be (*s*); [even if *en ventre sa mere* (*t*).—ED.]

And if the infant executor be so young that he hath no discretion (for it is not only lawful to make such an one executor, but also the child in the mother's womb and unborn at the death of the testator); in that case the ordinary, or other to whom the approbation of the testament appertaineth, after the birth of the child, doth commit the execution of the will to the tutor of the child for the child's behoof, until he be able to execute the same himself (*u*); which tutor hath authority to deal as executor until the child be able to undertake the executorship, that is to say, until he be of the age of seventeen years. During which minority, the administrator to the child's use cannot sell or alienate any of the goods of the deceased, unless it be upon necessity, as for the payment of the deceased's debts, or that the goods would otherwise perish; nor let a lease for a longer term than whilst the executor shall be in minority, because having that office for the good and benefit of the child only, he may not do anything to his prejudice (*x*).

Appointing of
Executors.
Infant Exe-
cutor.

And after his age of seventeen years, before he shall come to the age of twenty-one, an act done by such infant as executor, as (for instance) the releasing of a debt due to the testator, or the selling or distributing of the testator's goods, is said to be sufficient in law; which is to be understood, upon true payment and satisfaction of the due to the deceased, made to the executor in minority; for then he may acquit and discharge the debtor for so much as he doth receive; for therein he doth perform the office and duty of an executor, which he is enabled to do; and so doing, his act shall bind him. But if he shall release without satisfaction, this act is not according to the office and duty of an executor; and therefore being without the compass of his office and duty, shall not bind or bar him from recovery thereof; for if it should, then should it be a *devastavit*, and charge the minor out of his own proper goods, which cannot be by law; for an infant may better his estate, but not make it worse, by contracting with or acquitting of another person (*y*).

[By 38 Geo. 3, c. 87, s. 6—

["And whereas inconveniences arise from granting probate to infants under the age of twenty-one, be it enacted, that where an infant is sole executor, administration, with the will annexed, shall be granted to the guardian of such infant, or to such other person

Where an In-
fant is sole
Executor,
Administra-
tion to be
granted to the
Guardian, &c.

(*r*) [See title *Popery*, vol. iii.]

(*s*) Swin. 331.

(*t*) [Godolph. pt. ii. c. 9, s. 1.]

(*u*) [Vide post, "*Administration*."]]

(*x*) Swin. 359, 360.

(*y*) Swin. 358, 359; 2 Bac. Abr. 377; vide post, "*Probate*."

as the spiritual court shall think fit, until such infant shall have attained the full age of twenty-one years, at which period, and not before, probate of the will shall be granted to him."

[This act, it should be observed, only applies in case of an infant being *sole* executor; for if there are several executors, and one of them is of full age, no administration *durante minore ætate* ought to be granted, for he who is of full age may execute the will (z). It has been said, that if it be a woman infant who is made executrix, and if her husband be of age and assent, it is as if she were of age, and her husband shall have execution of the will (a).—ED.]

M., 1730, *Jones v. The Earl of Strafford* (b). In the case where an administration is granted during the minority of an infant executrix being under the age of seventeen years, and she marries a husband of age, King, Lord Chancellor, and Raymond, Chief Justice, strongly inclined against the opinion reported by Lord Coke in *Prince's case* (c), that such administration during the minority of the executrix is determined; the same being extrajudicial in that case, and not taken notice of by other contemporary reporters; and the author of the book entitled *The Office of Executors*, mentioning this opinion, a little marvels thereat, considering (as he observes) that these things are managed in the spiritual court, and by the canon law, which intermeddles not with the husband in the wife's case; and that by that law, and not by the common law, comes in this limitation of seventeen years; and he adds, that he hath seen that case otherwise reported in this point.

*Feme Covert
Executrix.*

Swinburne says, if a *wife* during the coverture be named executrix, she alone cannot sue for any debt due to the testator, without her husband; but (he says) she alone may do an act extra-judicial, as the paying of debts or legacies, or the receiving or releasing of any debts due to the testator (d).

And the husband and wife being but one person in law, she cannot be executrix without his assent, for if she might, then he would be executor against his will; therefore, if she is made executrix, she cannot bring an action alone, but her husband must join with her; and if he should refuse, he cannot be compelled, nor can she be compelled to plead without her husband (e).

[Another reason is, that in all actions by or against the wife the husband by our law must be joined (f).—ED.]

But (Swinburne says) although she cannot sue or be sued without him, yet she may deliver any of the testator's goods to

(z) [*Pigot and Gascoigne's case*, Brownl. 46; *Foxist v. Tremaine*, 1 Mod. 47. *Vide post*, as to "*Administration durante Minoritate*."]

(a) [Wentw. Off. Ex. c. 18, p. 392; Toller, 31.]

(b) 3 P. Will. 88.

(c) [5 Co. 296.]

(d) Swin. 417. [Godolph. part ii. c. 10; Wentw. Off. of Ex. 377, 14th edit.]

(e) Swin. 417, 418.

(f) [*Taylor v. Allen*, 2 Atk. 212, Lord Hardwicke.]

another to keep; and may pay legacies, and receive debts, and give acquittances without her husband; and if any *devastavit* is made by giving acquittances, it shall bind them both, because she could not administer without his assent; and it shall be accounted his folly to suffer such a person to administer (*g*).

*Feme Covert
Executrix.*

But it seemeth that this must be understood only according to the spiritual law, which in this case maketh no difference betwixt married and sole; for otherwise it is by the common law.

[If the spiritual court compel a *feme covert* to take upon her the office when the husband refuses, it seems a prohibition will lie (*h*); but administration taken by the wife during coverture must be presumed to be with the consent of the husband (*i*). It does not seem quite clear whether, if the wife administer without the husband's assent, they are estopped from pleading in an action brought against them that she was not executrix (*k*). The ecclesiastical court will not fasten the executorship on the wife against her will at the request of the husband (*l*).

[But it is said, that though the will be not proved, if the husband administer in the wife's right, though against her consent, that she is so far concluded thereby as to be unable during his life to decline or avoid the executorship (*m*). But she may refuse after his death if she has never intermeddled with the administration (*n*). But there is a difference in the case of a *feme sole* made executrix who marries before either proving or refusing to prove the will, for by marrying before her determination is taken, she delivers up the affair into her husband's hands, and if he administer, this is such an acceptance as will bind her, and she can never afterwards refuse (*o*).—ED.]

For by the common law, the assent to a legacy by a *feme covert* executrix is not good, unless her husband assent to it also, otherwise it is void; but the assent to such legacy by her husband is good (*p*).

And the release of a *feme covert* executrix is not good, for she can do nothing to the prejudice of her husband; but without question the release of the husband is good (*q*).

(*g*) Swin. 418.

(*h*) [3 Bac. Ab. title "Executors," (A.)]

(*i*) [*Adair v. Shaw*, 1 Sch. & Lev. 266.]

(*k*) [3 Bac. Ab. title "Executors," (A); Godolph. part ii. c. 10, s. 4; Wentw. Off. of Ex. 377, 378, 14th edit.; 1 P. Wms. on Ex. and Ad. 166.]

(*l*) [See Wentw. and Godolphin, cited above; and *Da Rosa v. Da Pinna*, 2 Lee, 390.]

(*m*) [Wentw. and Godolphin, as above; 1 Salk. 306, in *Warkford v. Warkford* (Lord Holt); *Thrustout v. Coppin*, 2 W. Black. 802.]

(*n*) [*Stokes v. Porter*, Dyer, 166; *Beynon v. Collins*, 2 Bro. C. C. 323; note to *Adair v. Shaw*, 1 Sch. & Lef. 258.]

(*o*) [Wentw. Off. of Ex. 379, 14th edit.; Godolph. part ii. c. 10.]

(*p*) Law of Ex. 264; 2 Bac. Abr. 378.

(*q*) Curson, 53; 1 Rolle's Abr. 924.

Feme Covert
Executrix.

And this not only during the marriage, but also after the death of the husband. But if the wife die, the husband cannot convert any of the goods and chattels belonging to the first testator to his own proper use; for of such goods the wife herself may make a testament (Swinburne says), appointing an executor, without the licence of her husband (r).

And if the husband commits waste, and then she dies, there is no remedy at common law against her husband, but only in the spiritual court, where he will be compelled to make restitution (s).

In the case of *Taylor v. Allen*, Oct. 29, 1741 (t), the testator made the defendant, Allen, who was a *feme covert*, his executrix, the husband being then in England, but at the death of the testator the defendant's husband was in the West Indies. It was moved for an injunction to restrain the defendant from getting in the assets of her testator, and for a receiver to be appointed. By Lord Hardwicke:—There are several instances where this court hath interposed to prevent an executor from getting assets of a testator into his hands upon particular circumstances, and this is one of those cases, for the husband being in the West Indies, and not amenable to the process of this court, the plaintiff can have no remedy if the executrix waste the assets, or refuse to pay, because the husband must be joined in the action. And a receiver was appointed to collect in the assets, and to bring actions in the name of the executrix for recovery of debts due to the testator; on giving security to indemnify the executrix and her husband on account of such actions brought.

Executor
bankrupt, or
non compos.

Although an executor becomes a *bankrupt*, yet administration cannot be committed to another (u), but if an executor become *non compos*, the spiritual court may commit administration (x).

[By the English as well as the civil law, idiots and lunatics are incapable of being executors or administrators, for these disabilities not only render them incapable of executing the trust reposed in them, but also incapacitate them for determining whether they will take upon them the execution of the trust or not (y). If an executor therefore become *non compos*, the Court of Probate may commit administration to another (z).

[The appointment by formal instrument of a party to be an executor, which is in law a beneficial office, can only be revoked expressly or by necessary implication. Where, therefore, by a first appointment, A., B. and C. were made executors, and by

(r) Swin. 417. *Vide supra*.

(s) 1 Rolle's Abr. 919.

(t) 2 Atk. 213.

(u) [Nor can the ordinary demand caution of an executor supposed to be insolvent. *Rex v. Raines*, 1 Raym. 361; *Hathornwaite v. Russell*, 2 Atk.

127; 3 P. Wms. 336, note to *Hanning v. Style*; *Hill v. Mills*, 1 Show. 293.]

(x) 2 Bac. Abr. 376.

(y) [Bac. Abr. "Executors," (A); *Godolph.* part ii. c. 6, s. 2.]

(z) [*Hill v. Mills*, 1 Salk. R. 36.]

two codicils, B. and C.'s appointments were revoked, and D. and E. were named in their places, this does not revoke the appointment of A., who was not noticed in the subsequent alterations, and A., D. and E. are the executors (*a*). An executor for whom an appearance had been given may be dismissed, for it is not unusual for the court to dismiss an executor who has not intermeddled with the effects, or gone to such a length in a cause as to render himself liable to costs (*b*).

Executor
bankrupt, or
non compos.

And in the Court of Chancery, forasmuch as an executor is considered only as a trustee, if he be insolvent, that court will oblige him, as they will any other trustee, to give security before he enters upon the trust (*c*).

If it appear that an executor is insolvent or the fund in danger, the court will appoint a receiver, or order as much as he admits to have in hand to be paid into the bank (*d*).

And by a constitution of Archbishop Stratford, the executor at the time of proving the will, shall give security (if need be) to render a just account of his administration, when duly thereunto required by the ordinary (*e*).

As to the *form and manner* of making an executor in the will, it is not always necessary to express this word *executor*, neither hath every testator skill so to do, but it is sufficient if the testator's meaning do appear by other words of like sense or import; as, if the testator say, "I commit all my goods to the disposition of A. B." or, "I leave all my goods, or the residue of all my goods to A. B., or the like; for in these cases, he to whom all the residue is bequeathed, is thereby understood to be made executor (*f*).

Form and
manner of
appointing.

[An executor may be appointed in conjunction with others; but in the latter case they are all considered by the law in the light of an individual person (*g*).

[Lastly, it should be observed, that the king may be an executor (*h*). So may a corporate aggregate acting through their syndic (*i*); so may a corporation sole (*k*). And it seems agreed, that by our law an alien or one born out of the king's allegiance, may be an executor (*l*); though by the civil law he cannot, unless so appointed in a military testament (*m*).—ED.]

The Crown.

Corporations.

(*a*) [*Sherard v. Sherard*, 2 Phill. R. 251.]

(*b*) [*Panchard v. Weger*, 1 Phill. R. 212.]

(*c*) 2 Bac. Abr. 377.

(*d*) [*Ex parte Ellis*, 1 Atk. 101; *Strange v. Harris*, 3 Bro. C. C. 365; see also *Duncumbar v. Stint*, 1 Ch. C. 121; *The King v. Raines*, 1 Salk. 299; 1 Ventr. 355. Whether the spiritual court can exact security, *vide post*, "Probate,"]

(*e*) Lind. 177.

(*f*) Swinb. 247.

(*g*) [3 Bac. Ab. 30; Off. Ex. 95.]

(*h*) [4 Inst. 335.]

(*i*) [3 Bac. Ab. title "Executors," A. 2; Toller, 30, 31.]

(*k*) [Wentw. Off. of Ex. 39, 14th edit.]

(*l*) [*Caroon's case*, Cro. Car. 8.]

(*m*) [Godolph. part ii. c. 6, s. 1, as to alien enemies, see Lord C. B. Gilbert's History of C. P. 166; and 1 V. Wms. on Ex. and Adm. 163.]

Supervisors.

Overseers of a will have no power to intermeddle, otherwise than by counsel and advice, or by complaining in the spiritual court (n).

Sir Thomas Ridley takes occasion to wish that they might be made of more use, although at present (he says) they be looked upon only as candle-holders, having no power to do anything but hold the candle while the executors tell the deceased's money (o).

5. Construction of Wills.

Wills to be construed favourably.

The intention of the testator is called by Lord Coke the pole star, to guide the judges in the exposition of wills.

In *Rivers's case*, M., 1737 (p), the testator by his will gave certain lands to his two sons, James and Charles Rivers. It appeared that they were illegitimate children, and the question was, whether this is such a description of their persons as will entitle them to take under the will. By Lord Hardwicke:—In the case of a devise, any thing that amounts to a *designatio personæ* is sufficient; and though in strictness they are not his sons, yet if they have acquired that name by reputation, in common expression they are to be considered as such. It hath been objected also, that the testator hath made a mistake in their *names*, and that therefore they cannot take, but the law is otherwise; for if a man is mistaken in a devise, yet if a person is clearly made out by averment to be the person meant, and there can be no other to whom it may be applied, the devise to him is good.

Bastards, when shall take and not take as Children.

Under a devise to "children, *generally*," it was held that an illegitimate child was not entitled to share, notwithstanding a strong implication upon the will in favour of the child (q): but it is otherwise if proved by the *will itself* to be so intended, but extrinsic evidence can only be received for the purpose of collecting who had acquired the reputation of children (r). Bastards cannot take as children of any particular person, till they gain names by reputation. That reputation begins with their births. Therefore, a bequest to *all* the natural children of J. S., extends not to bastards born after the making of the will, nor to a child *en ventre sa mere* (s). And this rule applies, though the bequest was to be paid as testator should by deed appoint; for his appointment, referring to the will, was held to be a codicil only (t). But a bastard may take by purchase, if suffi-

(n) Wentw. 9, 10.

(o) Ridley, part iv. ch. 2. [For attestation of the will, *vide ante*, 100.]

(p) 1 Atk. 410.

(q) *Cartwright v. Vawdry*, 5 Ves. 530; *Godfrey v. Davis*, 6 Ves. 43.

(r) *Swaine v. Kinnerley*, 1 V. & B. 469.

(s) *Metham v. Duke of Devon*, 1 P. Wms. 529, 530; *Arnold v. Preston*, 18 Ves. R. 288; *Earle v. Wilson*, 17 Ves. 531; *Wilkinson v. Adam*, 1 Ves. & B. 422, 452, 466.

(t) *Metham v. Duke of Devon*.

ciently described, and if he has acquired the reputation of being the child of that person (*u*). A legacy to "the children of the late C., who shall be living at the testator's death," extends to illegitimate children then living, where C. had no legitimate children. And it was also held, that where there were not nor ever can be any persons strictly answering the description of "*children*," it is necessary to resort to evidence *dehors* the will, to discover whether there were any who had acquired the reputation of children; for it is possible that *illegitimate* children may acquire that reputation (*x*).

But although by the law the intention is more to be considered than the words, yet such intention must be collected out of the words, and it must consist with the law (*y*).

Construction of Wills according to the intention of Testator.

A will cannot be varied upon the ground of mistake, unless the alleged mistake be clearly inconsistent with the intention upon the *whole* will (*z*). Where such mistake does appear, the court will correct it (*a*). If two parts of a will be totally irreconcilable, the latter overrules the former (*b*). But Mr. Bridgman observes, that this rule, though adopted from necessity, is not satisfactory, especially on account of the retrospective effect on the execution of the whole and each part of the will at once. In a late case, Lord Ellenborough laid down this rule, that the court could not go into one part of a will to determine the meaning of another, *perfect in itself*, and *without ambiguity*, and not militating with any other provision respecting the same subject-matter, notwithstanding that a more probable disposition for the testator to have made might be collected from such assisted construction (*c*).

Thus, in *The Lord Cheiney's case*, M., 33 & 34 Eliz. (*d*), Sir Thomas Cheiney, knight, lord warden of the cinque ports, made his will in writing, and thereby devised to Henry, his son, divers manors, and to the heirs of his body, the remainder to Thomas Cheiney, of Woodley, and to the heirs male of his body, upon condition *that he or they, or any of them, shall not aliene or discontinue*. And the question was in the Court of Wards, between Sir Thomas Perot, heir general to the lord warden, and divers purchasers of Sir Thomas Cheiney, whether the said Sir Thomas Perot shall be received to prove by witnesses, that it was the intent and meaning of the deviser to include his son and heir within these words of the condition [*he or they*], and not only to restrain to Thomas Cheiney, of Woodley, and his heirs male of his body. But Wray and Anderson, Chief Justices, upon conference had with the other justices, resolved that he shall not be received to such aver-

(*u*) *Wilkinson v. Adam*.

(*a*) *Phillips v. Chamberlain*, 4 Ves.

(*x*) *Woodhouselee v. Dalrymple*, E., 51. 1817; 2 Meriv. R. 419; see notes, p. 148 and 166.

(*b*) *Sims v. Doughty*, 5 Ves. 243.

(*c*) *Right and Compton v. Compton*, 9 East's Rep. 267.

(*y*) Swin. 10.

(*z*) *Mellish v. Mellish*, 4 Ves. 45.

(*d*) 5 Co. 68.

Construction
of Wills ac-
cording to the
intention of
Testator.

ment out of the will; for a will concerning lands ought to be in writing, and not by any averment out of it; for it will be full of great inconvenience if none shall know by the written words of a will what construction to make, or what advice to give, but the same shall be controlled by collateral averments out of the will. But if a man hath two sons, both baptized by the name of John, and thinking that the elder, who hath been long absent, is dead, deviseth his land by will in writing to his son John generally, and in truth the elder is living; in this case the younger John may, in pleading or in evidence, allege the devise to him; and if this be denied, he may produce witnesses to prove the intent of his father, that he thought the other to be dead, or that at the time of making the will he named his son John the younger, and the writer omitted the addition of the younger, and in this case no inconvenience can arise, for he who shall see the will by which the land is devised to his son John, cannot be deceived by any secret invisible averment, for when he shall see the devise to his son John, he ought at his peril to inquire what John the testator intended, which may easily be known by him who writ the will, and others who were privy to the intention; and if no direct proof can be made of the intention, then the devise is void for the uncertainty.

But this rule hath received a distinction of late, which hath greatly prevailed, between evidence offered to a court, and evidence offered to a jury. For in the last case, no parol evidence is to be admitted, lest the jury should be inveigled by it; but in the first case it can do no hurt, being to inform the conscience of the court, who cannot be biassed or prejudiced by it. And accordingly, in divers instances, collateral evidence hath been admitted in the Court of Chancery to explain the testator's intention (e).

And in the case of *Selwin v. Brown*, M., 1734, Lord Talbot admitted that it had sometimes been allowed (f).

In *Fonnereau v. Poyntz* (g), the testatrix gave several legacies of *stock in long annuities*, viz. 500*l.*, 500*l.*, 200*l.*, and 100*l.*, and the residue to her nephews; and it being uncertain from the other directions of the will whether the above-mentioned sums were meant as annuities to those amounts, or as gross sums of money to be laid out in the long annuities, Lord Thurlow, C., at first decreed that the sums were annuities, and that the legatees must abate proportionably; but on a rehearing, his lordship admitted collateral evidence of the value of the testatrix's estate, which was only 120*l.* per annum long annuities, and decreed that the legacies were gross sums; because it could not be supposed that the testatrix meant to give away in legacies ten times more than she was worth. Such evidence

(e) Law of Test. 306; 2 Bac. Ab.
309.

(f) Cas. Talb. 240.

(g) 1 Bro. C. C. 472.

was also admitted by Lord Hardwicke in *King v. Philips* (h). In which cause the question being, whether the plaintiff could take as a creditor under articles, and also as a legatee under a will? his lordship said, "This legacy being so near in value to the personal estate that it will defeat the rest, I will do what Lord Jefferies and Lord Cowper have done in such a case, direct an account to be taken of the value of the personal estate at the testator's death, and at the making of the will; which fact may give some light as to the intent, and is a fact necessary to be known before I determine it." So parol evidence may be received to show that the name of one legatee has been inserted for that of another (i).

Construction of Wills according to the intention of Testator.

But notwithstanding these cases, the courts have been very unwilling to admit of parol evidence in relation to any thing that appears on the face of a will; and it is certain that too much caution cannot well be used in this particular, especially when it is considered that the statute of frauds and perjuries, which was made to prevent perjury, contrariety of evidence, and uncertainty, binds the courts of equity as well as the common law courts; as also that little regard ought in many cases to be had to the expressions of the testator either before or after the making his will, because possibly these expressions might be used by him on purpose to conceal or disguise what he was doing, or to keep the family quiet, or for other secret motives and inducements which cannot after his death be found out (k).

And in the case of *Lowfield v. Stoneham*, M., 20 Geo. 2, 1747 (l), upon *plene administravit* pleaded, the question was, whether 1000*l.* received by the defendant was due to her in her own right, or as executrix of her husband, and consequently assets. And it arose upon the following devise: "I give to my loving brother John Stoneham 1000*l.*, and in case of his death, to his wife Susanna" (who was the defendant). It appeared that John Stoneham survived the testator. And therefore the plaintiff insisted this legacy (which the defendant admitted that she had received) vested absolutely in him, and was assets in her hands. On the part of the defendant it was offered to give in evidence that the testator *in extremis* declared he meant only to give his brother the interest of the 1000*l.*, and that the defendant should have the principal in case she survived him. The parol evidence was opposed by the plaintiff's counsel, as being contradictory to the plain words of the will. And Lee, C. J., said it could not be allowed; and that in the case of *Selwin v. Brown* (aforesaid) the House of Lords had refused it (m), even where it was to support the legal

Lowfield v. Stoneham.

Parol Evidence contradictory of plain Words of Will not allowed.

(h) 1 Ves. 232.

(l) Cited *Cambridge v. Rous*, M.,

(i) 8 Vin. Ab. 312, 29; 2 Ves. 1802, 8 Ves. R. 22.

216; 6 T. R. 671.

(m) 3 Brown's Parl. Ca. 607, 8vo.

(k) 2 Bac. Ab. 310.

edit.

interpretation of the will; and Lord Hardwicke, about two years ago, held it in the same manner in the case of the *Earl of Inchiquin v. Obrian* (n).

Construction.
Ulrich v.
Litchfield.

And in the case of *Ulrich v. Litchfield*, July 23, 1742 (o), the testatrix bequeathed her real and personal estate to Elizabeth Travers and James Ulrich, equally between them for life; and upon the death of Elizabeth Travers, she gave the whole estate to James Ulrich in tail general, and for want of such issue to Richard Ulrich in fee; with a few pecuniary legacies; and charged her real estate with payment of these legacies if her personal estate should not be sufficient; and by her will declared she gave all the *rest and residue of her personal estate* to her uncle Leonard Collard's three daughters; and particularly gave to Mrs. Susanna Litchfield 10*l.*, and made her executrix. For the residuary legatees it was insisted, that *rest and residue* of her personal estate must mean the residue after the particular legacies are paid off; and could not refer to the beginning of the will, because there is a fee devised, and consequently the testatrix has disposed of the whole: That parol evidence in this case may be admitted of the attorney who drew the will, that he had express directions to give the personal estate to the three daughters of Leonard Collard: That (to be sure) things which are quite contrary to the will shall not be proved by parol evidence, but that it may be allowed to explain words in a will, especially in this case, where it appears to be a mere blunder in the drawer: That this doth not intrench upon any of the rules with regard to parol evidence, but only clears up who was intended to have the personal estate, where the whole is devised to two different persons; and that it seems clearly to be a blunder in the drawer of the will, because the devise in the first part of it is proper only in the disposing of real estate. By the Lord Chancellor Hardwicke: "As to the question, whether I ought to admit parol evidence to explain the intention of the testator, I am of opinion that this is not a case in which parol evidence can be read, and would be of dangerous consequence: it is true there are some things here which would make a judge wish to admit it; but I must not follow my inclinations only, for I do not know that upon construction of a will courts of law and equity admit parol evidence except in two cases: First, to ascertain the person, where there are two of the same name, or there has been a mistake in a christian or surname, and this upon absolute necessity, where if such evidence were not let in it would make the will void. A devise to one by the name of *Mary*, whose christian name was *Elizabeth*, is good, if the jury find from the circumstances that she was the person *meant* to be designated (p). Legacy to 'James, son of Thomas A.' There was no person of that description; but there was a 'Thomas, son of James A.' The

Lord Hard
wicke.

(n) Str. 1261.

(o) 2 Atk. 372.

(p) *Doe d. Cook v. Davison*, 7 East's Rep. 299.

Court of Chancery will not receive evidence to show this to be a mistake in the description (q). Again, where the words were, 'I leave to all my grandchildren,' the will was held void for uncertainty both in the subjects and object of the bequest: for though it was alleged that the mistake was made in writing 'to all' for 'all to,' the court refused to insert or transpose words for the purpose of giving a meaning to an instrument which had none (r). Bequest of stock, not standing in testator's own name, but in that of trustees, parol evidence of the fact is admissible, and it will pass by the will (s). The other case is, with regard to resulting trusts relating to personal estate; where a man makes a will, and appoints an executor, with a small legacy, and the next of kin claim the residue; in order to rebut the resulting trust for the next of kin parol proof hath been admitted to ascertain the person who was to have the residue (t). It is very true cases may be cited where Lord Cowper has admitted such evidence; for he went upon this ground, that it was by way of assisting his judgment in cases extremely dark and doubtful. I have the greatest deference for his judgment, but must own I was never satisfied with this rule of Lord Cowper's of admitting parol evidence in doubtful wills; besides, he went further in the great case of *Strode v. Russell* (u), in which there was an appeal to the House of Lords; Mr. Justice Tracey, who assisted Lord Cowper in that cause, was at first of the same opinion with him, but upon considering it more, disavowed his first opinion, and was clear that it could not be admitted, and this alteration in his judgment was mentioned in the House of Lords. In the case of *Selwin v. Brown* I was of opinion that it ought to have been admitted; and even Lord Talbot, when he had heard the cause, had a remorse of judgment at the same time that he rejected the parol evidence: but the House of Lords refused it as of most mischievous consequence, and affirmed his decree. In the present case, here is in the will undoubtedly a contradiction and repugnancy; for in the first place she has given all her personal estate to the plaintiff, and yet legacies come afterwards, and a devise of the residue. What then must be the construction? As to the general question, where the same thing is described generally, and given to two different persons in the former and latter part of a will, Lord Coke was of opinion the latter words shall revoke the former; but in *Plowden* (x) it is said they shall take as joint tenants. I own the reasoning in *Plowden* is not convincing to me; I rather incline to Lord Coke's, though the latter cases

Construction.
Lord Hard-
wicke, in
Ulrich v.
Litchfield.

(q) *Andrews v. Dobson*, 1 Cox, 425. 451.

(r) *Mohun v. Mohun*, 1 Swanst. Rep. 201; 1 Wils. Ch. Rep. 151.

And see *Bowman v. Milbanks*, 1 Lev. Rep. 130.

(s) *Hewson v. Reed*, 5 Madd. R.

(t) *Vide Blinkhorn v. Feast*, 2 Ves.

27.

(u) 2 Vern. 621.

(x) *Paramore v. Yardley*, post.

Construction.
Lord Hard-
wicke, in
Ulrich v.
Litchfield.

have taken it otherwise. But no certain rule is to be laid down as to construction of devises: so says Swinburne, but that they must depend upon their particular circumstances. Upon the whole of what Swinburne says the result is this: that if the same thing be given to two persons, they shall take as joint tenants, unless there is something to indicate and prove the intention of the testator to revoke and vary the devise. Now try the present case by this rule, and see if it doth not come exactly within it. The testatrix, by giving legacies after the devise of all the personal estate, has varied the will for so much. It is truly said, that a man may give the whole in a former part, and qualify it afterwards, and still the first legatee is entitled in part. But here, in case the whole personal estate should not be sufficient to pay the legacies, she charges the real estate with them, upon a supposition that the other might not be sufficient; and therefore is a plain indication of her intention in one event totally to revoke the devise of the personal estate. And there being an alteration of her intention before she finishes her will, the construction is, she hath altered her intention throughout, and the plaintiff is not entitled to any part of the personal estate, but the residue belongs to the three daughters of Leonard Collard." And decreed accordingly.

Other Cases
of Construc-
tion. Letters
and Oral De-
clarations of
Testator re-
jected.

[In the case of *Strode v. Lady Faulkland* (y), letters and oral declarations of the testator were rejected. In *Brown v. Selwin* (z), which is held to be one of leading authority, the evidence of the drawer of the will was rejected. The decree of Lord Talbot was affirmed by the House of Lords. In the case of *Lord Walpole v. Earl of Cholmondeley*, it was held that an express republication of a will could not be controlled by parol evidence (a); *à fortiori*, parol evidence is not admissible to supply any clause or word which may have been inadvertently omitted by the person drawing or copying the will (b). It should seem, however, that though you cannot resort to parol evidence to control the effect of words or expressions which the testator has used, by showing that he used them under mistake; nor to supply words which he has not used; yet, that upon an issue of *devisavit vel non*, you may prove that clauses or expressions have been inadvertently introduced into the will contrary to the testator's intention and instructions; or, in other words, that a part of the executed instrument is not his will (c).

How far
Parol Evi-
dence is ad-
missible.

[Parol evidence is also admissible for the purpose of coun-

(y) [3 Ch. Rep. 68.]

Langston v. Langston, 8 Bligh, N. S.

(z) [Cas. temp. Talbot, 240; S. C. 167.]
in Dom. Proc.; 3 Bro. P. C. Toml.
ed. 607.]

(a) [7 Durn. & East, 198; S. C. 3 Vesey, 402.]

(b) [*Earl of Newburgh v. Countess of Newburgh*, 5 Madd. 364; see also

(c) [*Hipperley v. Homer*, Turn. & R. 48, n.; Jarman on Wills, vol. i. p. 355; and the recent case of *Doe d. Howell v. Thomas*, 1 Man. & G. 335; 1 Scott, N. R. 359.]

teracting fraud (*d*), and in order to ascertain what is comprehended in the terms of a given description referring to an extrinsic fact (*e*).—ED.]

And notwithstanding that wills are generally favoured by the law, yet where the testator endeavours to establish a settlement against the reason and policy of the common law, the judges will reject it (*f*).

Will against Reason and Policy of Common Law.

Also where the testator by his will maketh no other disposition of his estate than the law itself would have done, had he been silent; there such a will is useless, and shall be rejected; and therefore if a devise be made to a person and his heirs, which person is heir at law to the devisor, this is a void devise, and the heir shall take by descent as his better title; for the descent strengthens his title, by taking away the entry of such as may possibly have right to the estate; whereas if he claims by devise, he is in as by purchase (*g*).

Also devises are void and rejected where the words of the will are so general and uncertain that the testator's meaning cannot be collected from them; and therefore where a man by will gave *all* to his mother, the general words did carry no *lands* to his mother; for since the heir at law hath a plain and uncontroverted title, unless the ancestor disinherits him, it would be severe and unreasonable to set him aside, unless such intention of the testator is evident from the will; for that were to set up and prefer a dark and at best but a doubtful title to a clear and certain one (*h*).

So where it was uncertain which of two limitations personal property, directed to be laid out in land and therefore considered as land, was to follow, it was decreed to the heir at law (*i*).

Wills frequently refer to deeds and other written instruments, which are then taken to be part of the will, and explanatory thereof (*k*).

Wills referring to Deeds.

The clause of *perfect mind and memory* is more usual than necessary in a will, and yet not hurtful (*l*).

Clause of perfect Mind and Memory.

But in case of a contestation, it is necessary to prove the sanity of the testator (*m*).

(*d*) [*Small v. Allen*, 8 Durn. & East, 147; Lord Kenyon in *Strickland v. Aldrige*, 9 Ves. 519; *Drakeford v. Wilkes*, 3 Atk. 539.]

(*e*) [*Doe d. Clements v. Collins*, 2 Durn. & East, 498; *Goodtitle v. Southern*, 1 Man. & S. 299; *Buck d. Whalley v. Newton*, 1 Bos. & P. 53; *Sandford v. Raikes*, 1 Mer. 646, Sir W. Grant; and generally on this subject I would refer the reader to Chap. xiii. "Parol Evidence how far Admissible," in Mr. Jarman's recent treatise on Wills, and to p. 866, vol. ii. of Mr. V. Williams on Ex. and Adm. "Of the Construction of Wills

of Personalty."—ED.]

(*f*) Gilb. 110; 2 Bac. Abr. 79.

(*g*) Gilb. 110; 2 Bac. Abr. 79; [*Hedger v. Rowe*, 3 Lev. 127; Moor. 680; *Lytton v. Lytton*, 4 Bro. C. C. 441.]

(*h*) Gilb. 112; 2 Bac. Abr. 81.

(*i*) *Leslie v. Devonshire*, 3 Bro. C. C. 188; [*Jenkins v. Herries*, 4 Madd. Rep. 67.]

(*k*) *Metham v. Duke of Devon*, 1 P. Wms. 529; 8 Vin. Abr. 45; *Hawtree v. Trollop*, Ch. Rep. 265.

(*l*) Swin. 77.

(*m*) 2 Atk. 56.

6. *What will pass Fee Simple.*

What Words
will pass a
Fee Simple,
or a Life
Estate only.

A devise made *in fee simple*, without express words of heirs, is good in fee simple; but if a devise be made to *A. B.*, he shall have the land but for term of life; for these words will carry no greater estate (*n*).

If a man devise all his *estate* which he hath in such a place, without mentioning the heirs of the devisee, courts of equity have held that it shall extend to such heirs, for that the word *estate* implies the whole property and interest therein, especially in the case of children, to whom the parent, unless there is some express limitation, cannot intend a life estate only (*o*).

If lands be devised to a man, to have to him *for ever*, or to have to him and his *assigns*; in these two cases the devisee shall have a fee simple; but if it be given by feoffment in such manner, he hath but an estate for term of life (*p*).

If a man devise his land to another, to give, sell, or *do therewith at his pleasure* or will, this is fee simple (*q*).

A devise made to one and to his *heirs male*, doth make an estate tail; but if such words be put in a deed of feoffment, it shall be taken for fee simple, because it doth not appear of what body the heirs male shall be begotten (*r*).

If lands be given by deed to one, and to the *heirs male of his body*, who hath issue a daughter who hath issue a son, and dies, there the land shall return to the donor; and the son of the daughter shall not have it, because he cannot convey himself by heirs male, for his mother is a let thereto; but otherwise it is of such a devise; for there the son of the daughter shall have it rather than the will shall be void (*s*).

If lands be given by deed to one and *his heirs for ever*, and *if he die without heirs*, then to his brothers or sisters, this last is void, because the first gift conveyeth unto him the fee simple; but in a will, such devise over is good, and such limitation shall convey but an estate tail. As in the case of *Tyte v. Willis*, M., 7 Geo. 2 (*t*). The testator devised his lands to his wife Jane for life, the remainder to his son Henry for life, remainder to his son George *and his heirs for ever*; and if he died *without heirs*, then to his two daughters, Katherine and Jane. The question was, whether George took a fee simple, or only an estate tail. And the case of *Webb v. Herring* (*u*) was cited, to prove that where a devise is to one and his heirs, and if he die without heirs, remainder over to another, who is or may be the devisor's heir at law, such limitation shall be good, and the first limitation construed an entail,

(*n*) Terms of the Law, tit. Devise; Black. Rep. 1045.

(*o*) By Lord Hardwicke, in the case of *Bailis v. Gale*, Nov. 6, 1750; 2 Ves. 48.

(*p*) Terms of the Law, tit. Devise.

(*q*) Terms of the Law, tit. Devise.

(*r*) Ibid.

(*s*) Ibid.

(*t*) Cas. Talb. 1.

(*u*) Cro. Jac. 415.

What Words
will pass a
Fee Simple,
or a Life
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and not a fee, in order to let in the remainder-man; but where the second limitation is to a stranger, it is merely void, and the first limitation is a fee simple. And by the Lord Chancellor: In this case George took an estate tail. The difference which hath been taken is right; and the reason of it is, that in the latter case there is no intent appearing to make the words carry any other sense than what they import at law; but in the former, it is impossible that the devisee should die without an heir, while the remainder-man or his issue continue. And therefore the generality of the word *heirs* shall be restrained to heirs of the body, since the testator could but know that the devisee could not die without an heir while the remainder-man or any of his issue continued.

But in the case of *Tilburgh v. Barbut*, Mar. 2, 1748 (v), where the remainder-man, being of the half blood, could never possibly inherit, it was decreed by Lord Hardwicke, that this being a fee mounted on a fee, it vested in the first taker, and the remainder over to the half brother was merely void.

If a remainder be given by will after an estate tail, and the first estate never take place, the remainder vests in possession. Thus if one devise to A. and the heirs of his body, and for default or want of such issue of A. to B., and A. die in the lifetime of the devisor, leaving issue, the estate shall go to B. and not to the issue of A. (x)

If one devise to an *infant in his mother's womb*, it is a good devise; but otherwise by feoffment, grant, or gift: for in those cases there ought to be one of ability to take presently, or otherwise it is void (y).

If one devise to a person by his will *all his lands and tenements*, here not only all those lands that he hath in possession do pass, but all those that he hath in *reversion*, by virtue of the word *tenements* (z).

If a man hath lands in fee, and lands for years, and deviseth *all his lands and tenements*, the fee simple lands pass only, and not the lease for years; but if a man hath a lease for years, and no fee simple, and deviseth *all his lands and tenements*, the lease for years passeth, otherwise the will would be merely void (a).

And in the former case the word *lands* may be explained by other words, so as to pass a leasehold interest, as "all his lands which he then stood seised or possessed of, or any ways interested in, and which were in the possession of A. B." (b) The word *farm* is sufficient to pass a leasehold estate, if such appear to have been the testator's intention (c).

(v) 3 Atk. 617; 1 Ves. 89.

(x) See *Hodgson v. Ambrose*, Doug. 337; and *White v. Warner*, cited in *Dense v. Bagshaw*, 6 Term Rep. 512.

(y) Terms of the Law; 8 Vin. Ab. 85.

(z) Ibid.

(a) Cro. Car. 293; *Rose v. Bartlett*, and *Pistol v. Richardson*, 2 P. Wms. n. 459.

(b) *Addis v. Clement*, 2 P. Wms. 455.

(c) *Lane v. Earl Stanhope*, 6 T. Rep. 346.

What Words
will pass a
Fee Simple,
or a Life
Estate only.

If a man seised of freehold lands, and of the legal estate of *copyhold* lands, makes a general devise of all his manors, messuages, lands, tenements, and hereditaments, but makes no *surrender of the copyhold lands to the use of his will*, the copyhold lands will not pass (d).

The words (all my *lands*) in a devise will pass a *house*; but the devise of a house doth not pass lands (e).

A devise of a *messuage* will carry with it a garden and curtilage; otherwise of a *house*, unless it be *with the appurtenances* (f).

The testator devised a house, *with the appurtenances*. The question was, whether land in a field passed. And it was adjudged, that the land did pass; for it was in a will, in which the intent of the devisor should be observed (g).

But in a like case, where it appeared upon evidence, that the house was copyhold, and the land freehold; it was adjudged, that the land could not in that case be said to be appurtenant, although it had been used with it (h).

A devise of the *inheritance* hath been held to be a devise of the lands (i).

If lands are devised to trustees, without the word *heirs*, yet by implication they must have an estate of inheritance sufficient to support the trust: for there is no difference between a devise to a man for ever, and to a man upon trusts, which may continue for ever (k).

If lands are devised to a man, *paying several sums* in gross, he hath a fee, though all the sums together do not amount to the annual rent of the land: for the devise shall be intended for his benefit, and if he had only an estate for life, he might die before he received the legacies out of the land, and consequently be a loser (l).

So if lands are devised to a man, in consideration that he *release a sum of money* due to him, he has a fee simple, on his release of the debt: for the devise being intended for his benefit, an estate for life might be determined before he could receive the sum out of the land (m).

But if lands are devised to a man, paying so much out of the *profits* of the lands, he takes but an estate for life; for although he takes the land charged, yet he is to pay no farther than he receives, and so can be no loser (n).

See this distinction taken in *Collier's case* (o). But if the expression "out of the rents and profits" be accompanied with other clauses which show an intention to give a fee, the inten-

(d) By Lord Hardwicke, in the case of *Gibson v. Styles*, July 18, 1741. Vide 1 Eq. Ca. Abr. 124, pl. 14.

(e) Mo. 359.

(f) 2 Cha. Ca. 27.

(g) Godb. 40.

(h) Cro. Eliz. 704.

(i) Sty. 308.

(k) 1 Abr. Cas. Eq. 176.

(l) Ibid.

(m) Ibid. 177.

(n) Ibid.

(o) 6 Rep. 16.

tion shall prevail (*p*). And if an estate is devised subject to an annuity, the fee shall pass, because the annuitant may survive the devisee (*q*).

What Words
will pass a
Fee Simple,
or a Life
Estate only.

A man devised that his lands should descend to his son, but he willed, that *his wife should take the profits thereof until the full age of his son for his education and bringing up*, and died. The wife married another husband, and died before the full age of the son. And it was the opinion of Wray and Southcote, justices, that the second husband should not have the profits of the lands until the full age of the son; for nothing is devised to the wife but a trust, and she is as guardian or bailiff for the benefit of the infant, which by her death is determined; and the same trust cannot be transferred to the husband: but otherwise, if he had devised *the profits of the land unto his wife until the age of the infant, to bring him up and educate him*; for that is a devise of the land itself (*r*).

In the case of *Hogan (s), lessee of Henry Wallis, Esq. and others v. Rowland Jackson, Esq.*, T., 15 Geo. 3, on a writ of error from the Court of King's Bench in Ireland, the case was, The Reverend George Jackson by his will devised as follows: "As to my *worldly substance*, I give and bequeath "to my mother, Mary Jackson, my house and lands of Glan- "begg, and all their appurtenances, for and during the term "of her natural life, and also my lands of Ballygally, subject "only to the rent payable thereout, for the term of her natural "life, without liberty of committing waste thereon:" And after several legacies and annuities, he gives all the *remainder* and *residue* of all his *effects* both *real* and *personal* to his said mother. The question was, Whether under the residuary clause, all the testator's real estates undisposed of by the will passed to his mother, Mary Jackson, so as to enable her to devise the same to the lessors of the plaintiff. And it was argued that they did. It is apparent that the great and chief object of the testator's bounty was his mother; therefore by way of securing a certain provision to her, he first gives her a life estate in two denominations of his real property. He then proceeds to dispense his bounty amongst his other relations; and perceiving there was still a surplus undisposed of, by one general sweeping clause, he devises to his mother every species of property he should die possessed of. And that he did not mean to die intestate, as to any part of his real or personal property, is manifest not only from the strong language of the residuary clause but from the introductory words of the will, *As to all my worldly substance*, which have always been understood to include both real and personal estate, and to indi-

*Hogan's
Case.*

(*p*) *Frogmorton v. Holiday*, 3 T. Rep. 13.
Bur. 1618.

(*r*) 2 Leon. 221.

(*q*) *Baddely v. Leppingwell*, 3
Bur. 1533; *Doe v. Richards*, 3 T.
Rep. 356; *Goodright v. Stocker*, 5

(*s*) [This is held to be a leading
case on this point.—ED.]

What Words
will pass a
Fee Simple,
or a Life
Estate only.
*Hogan's
Case.*

Meaning of
"Effects."

cate an intent in the testator who uses them, to dispose of all his property. And the several cases were cited, where words of the like import have always been understood to include all the testator's property. As, *all my worldly estate*, all my *temporal estate*, all the *rest and residue of my estate*. On the other hand, three rules were laid down for the construction of wills. First, that an heir at law shall not be disinherited but by express words or necessary implication. Secondly, that the whole of the will must be taken together; and nothing is to be rejected which has a determinate and fixed meaning in itself. And thirdly, where words used by a testator are indifferently applicable to real and to personal estate, they shall not be applied to the real in disinherison of the heir at law. As to the first of these, that the heir shall not be disinherited but by express words or necessary implication, here is clearly no express devise of the real estate. The word *effects* is properly applicable only to personal estate. And as to the word *real* annexed to it, this can at most apply only to *chattels* real, which it appears the testator died possessed of. As to the second rule, that the whole will must be taken together; the word *estate* in the introductory part is a technical expression, and improperly applicable to real estates: but the meaning thereof is qualified by the word annexed, my *worldly estate*, which always is understood to signify worldly *substance*, without expressly limiting the extent or quantum of such disposition. Thirdly, the words remainder and residue of my effects, *both real and personal*, do not necessarily refer to real estate, but are equally applicable to personal; and if so, they shall not be extended to disinherit the heir at law. By Lord Mansfield, Chief Justice: *There is one point upon which the whole case turns, which is, to fix the meaning of the word effects.* If it is equivalent to *worldly substance* used by the testator in the beginning of his will, or if it is synonymous to *property*, there is an end of the question: because then all the cases prove, that the sweeping clause passes a fee. On the contrary, if it can be shown that *effects* mean *chattels or personalty only*, then the residuary clause can include them only. I take *effects* to be synonymous to *worldly substance*, which means whatever can be turned to value; and therefore, that *real and personal effects* mean all a man's property. His lordship added, As this cause has already been nine years depending in Ireland, and as the court has no difficulty upon the question, which turns upon the construction of a very few words of the will, I think it is right, that we should give our opinion directly, without adding further delay, by deferring it to a second argument. The question upon the construction of the will is, whether, by virtue of the sweeping clause, any real property at all passed to Mary Jackson, the mother of the testator; and, if any did, whether it can pass for a longer time than during the life of Mary Jackson, because there are no words of limitation. In a conveyance of

real estate by the common law, it is required, in order to pass a fee, that there be words of limitation in the donation or grant. Without the word *heirs*, general or special, no man can create a fee at common law. Afterwards, when wills were introduced, and devises of real property began to prevail, being considered as a species of conveyance, they were to be governed by the same rule. Therefore, by analogy to that rule, in the construction of devises, if there be no words of limitation added, nor words of perpetuity annexed, which have been held tantamount, so as to denote the intention of the testator to convey the inheritance to the devisee, he can only take an estate for life. For instance, if a testator by his will says, I give my lands, or such and such lands to A.; if no words of limitation are added, A. has only an estate for life: generally speaking, no common person has the smallest idea of any difference between giving a personalty and a quantity of land. Common sense alone would never teach a man the difference; but the distinction which is now clearly established, is this: if the words of the testator denote only a description of the specific estate or lands devised; in that case, if no words of limitation are added, the devisee has only an estate for life. But, if the words denote the quantum of interest or property that the testator has in the lands devised; there, the whole extent of such his interest passes by the gift to the devisee. The question therefore is always a question of construction, upon the words and terms used by the testator. It is now clearly settled, that the words *all his estate* will pass every thing a man has. But if the word *all* is coupled with the word *personal* or a *local description*, there the gift will pass only personalty, or the specific estate particularly described. And having considered the whole of this will, including the introductory part, and the several particular bequests, and the general sweeping clause in the conclusion, his lordship gave his opinion, that the lessors of the plaintiff, the residuary legatees, are entitled, and therefore that the judgment of the King's Bench in Ireland must be reversed. Unto which the other three justices assented. Afterwards, upon a writ of error in the House of Lords, the judgment of the King's Bench reversing the judgment of the Court of King's Bench in Ireland was affirmed (t).

Afterwards, in the case of *Loveacres d. Mudge v. Blight*, M., 16 Geo. 3 (u), Lord Mansfield, in further explanation of the aforesaid rule, says thus:—"The principles by which this and other like cases must be governed, are settled by analogy to established rules respecting the limitation of estates by deed at common law. If a man by deed of conveyance at common law gives land to another *generally*, without words of *limitation*, the donee has only an estate for life. But I really believe that almost every case determined by this rule, as applied to a devise of lands in a will, has defeated the real intention of the

What Words
will pass a
Fee Simple,
or a Life
Estate only.
Hogan's
Case.

(t) Cowp. 299.

(u) Cowp. 352.

What Words
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Lord Mans-
field, in *Love-
acres v.
Blight*.

testator. For common people, and even others who have some knowledge of the law, do not distinguish between a bequest of personalty, and a devise of land or real estate (*x*). But, as they know when they give a man a horse they give it him for ever, so they think if they give a house or land it will continue to be the sole property of the person to whom they have left it. Notwithstanding this, where there are no words of limitation, the court must determine in the case of a devise affecting real estate, that the devisee has only an estate for life. Because the principle is fully settled and established, and no conjecture of a private imagination can shake a rule of law. But as this rule of law has the effect of defeating the intention of the testator, in almost every case that occurs, the court has laid hold of the generality of other expressions in a will, where any such can be found, to take the devise out of this rule. Therefore, if a man says, 'I give *all my estate*,' that has been construed to pass a fee; or, if even words of locality are added, 'as *all my estate in A.*,' it hath been held that the whole of the testator's *interest* in such particular lands will pass, though no words of limitation are added. Because the law says, that the word *estate* comprehends not only the land property which a man has, but also the *interest* he has in it. So in the case from Ireland, the court had no difficulty in saying, that the words '*all my worldly substance*,' in the introductory part of the will, meant every thing the testator had; and that the words '*all his real effects*,' in the subsequent residuary devise, were equivalent to *worldly substance*, and carried every thing to the residuary devisee. In general, wherever there are words and expressions, either general or particular, or clauses in a will which the court can lay hold of, to enlarge the estate of a devisee, they will do so to effectuate the intention. But if the intention of the testator is doubtful, the rule of law must take place. So if the court cannot find words in the will sufficient to carry a fee, though they should themselves be satisfied beyond the possibility of a doubt as to what the intention of the party was, they must adhere to the rule of law."

Result of
Cases.

The result of these and other cases seems to be, that the word "*estates*" in a will carries the fee, unless coupled with words which show a different intention (*y*). But the word

(*x*) [In the following cases vague and informal words have been held to pass real estates, *Hopewell v. Ackland*, Salk. 239; *Huxtep v. Brooman*, 1 B. C. C. 437; *Pitman v. Stevens*, 15 East, 505; *Barclay v. Collett*, 6 Scott, 408; *Wilee v. Wilee*, 5 Moo. & Pay, 582.]

(*y*) *Fletcher v. Smiton*, in K. B., 2 T. Rep. 656; *Tilley v. Simpson*, before Lord Hardwicke, C., *ibid.* 659.

[See the recent cases of *Doe d. Evans v. Evans*, 9 Ad. & E. 719; *Doe d. Booley v. Roberts*, 3 Per. & D. 578; 4 Jurist, 846; *Doe d. Tremewen v. Permewan*, 3 Per. & D. 330; *Adams v. Bush*, 8 Scott, 405; 6 Bing. N. C. 164; *Spry v. Bromfield*, 9 Sim. 534; and *Willis v. Hiscox*, 4 Jurist, 738; *Vaughan v. Headfort*, *ibid.* 649; *De Witte v. De Witte*, *ibid.* 625.]

“hereditaments” was not deemed sufficient by the Court of King’s Bench in *Denn v. Mellor* (z); which judgment was, however, reversed in the Court of Exchequer, M., 1796.

The word *legacy* may be applied to a real estate, if the context of the will show that such was the testator’s intention (a). [The words “estate” and “property,” though generally conveying real estate, may be restrained by their association with personalty, on the maxim “*noscitur a sociis* (b).”

Doctrine of
Restraint by
Association.

[It is by no means, however, to be inferred from the cases cited in the last note, that because such words as “estate” and “property” happen to be associated with words solely descriptive of personal estate, that they are thereby necessarily and invariably restricted to property *ejusdem generis*. The presumption, generally speaking, is the other way; there must be a clear *constat* of the intention of the testator so to limit them (c).

[*Hogan v. Jackson* (d) is considered, as we have seen, a leading case; in it the words “effects real and personal” were held to amount to a disposition of the whole real and personal estate; but it seems that “effects” without “real” would not pass lands (e).

[Sometimes a devise associated with the nomination to an executorship has been held to confine its operation to that species of property (*i. e.* personal) connected with the character of an executor (f).

[Sometimes the expressions themselves have been held, *ex vi terminorum*, to exclude real property from the devise, where the expressions used are inapplicable to a real estate (g).

[Sometimes words, exclusively applicable to personal property, have, by force of the context, been held to pass lands (h). —ED.]

(z) 5 T. Rep. 558.

(a) *Hardacre v. Nash*, 5 T. Rep. 716.

(b) [*Barnes v. Patch*, 8 Ves. 604; *Wilkinson v. Merryland*, Cro. Car. 477, 479; S. C. Sir W. Jones, 380; as to the words “whereof I am possessed,” in this case, see above *Hogan v. Jackson*, Cowp. 299; *Pitman v. Stevens*, 15 East, 505; *Nash v. Hay*, 5 Madd. 38; *Cliffe v. Gibbons*, 2 Lord Raym. 1326; *Marchant v. Twisden*, Gilb. Eq. Ca. 30; *Woollam v. Kenworthy*, 9 Ves. 137; *Bobb v. Pengore*, 11 East, 160; *Timewell v. Perkins*, 2 Atk. 102; *Roe d. Helling v. Yead*, 2 Bos. & Pull. New Rep. 214; both these last cases were much relied upon by Gibbs, C. J., in *Doe d. Bunny v. Rout*, 7 Taunt. 79.—ED.]

(c) [*Terrell v. Page*, 1 Ch. Ca. 262; *Scott v. Alberry*, Com. Rep. 337; S. C. 1 Eq. Ca. Ab. 209, c. 11; *Tilley v. Simpson*, referred to, Durn. & E. 659, n.; *Jongsma v. Jongsma*,

1 Cox, 362. The last case was that of *Doe d. Evans v. Evans*, 9 Ad. & E. 720; 1 Per. & Dav. 472.]

(d) [Cowp. 299.]

(e) [*Camfield v. Gilbert*, 3 East, 516; *Doe d. Chilcott v. White*, 1 East, 33; *Macnamara v. Lord Whitworth*, Geo. Coop. 241.]

(f) [*Shaw v. Bull*, 12 Mod. 592; *Piggott v. Penrice*, 1 Eq. Ca. Ab. 209, c. 13; but see *Doe d. Gillard v. Gillard*, 5 B. & A. 785; *Noel v. Hay*, 5 Madd. 38; *Thomas v. Phelps*, 4 Russ. 348; *Doe d. Pratt v. Pratt*, 6 Ad. & E. 180.]

(g) [*Doe d. Spearing v. Buckland*, 6 Durn. & E. 610; *Doe d. Hurrell v. Hurrell*, 5 B. & A. 18; *Doe d. Burkitt v. Chapman*, 1 H. Bl. 223; *Newland v. Majoribanks*, 5 Taunt. 538; *Dunnage v. White*, 1 Jac. & Walk. 583.]

(h) [*Hope d. Brown v. Taylor*, 1 Burr. 268; *Hardacre v. Nash*, 5 Durn.

7. Other Devises.

Devise to a
Feme covert
to her separate
use.

Rollfe v. Budder, H., 1724 (i). Devise of a bond by the son to his mother, to her sole and separate use; it is her sole property in equity, and her assignment of it is good.

So in the case of *Bennet v. Davis*, M., 1725 (k). A person seised of an estate in fee, devised it to the defendant's wife, who was his daughter, for her separate use, without any limitation to trustees; it was adjudged that the husband was but a trustee for the wife.

Devise to
Heirs Female.

If a devise be made to a man, and to the heirs female of his body begotten, and after, the devisee hath issue a son and daughter, and dieth; here the daughter shall have the land and not the son, and yet he is the most worthy person, and heir to his father. But because the will of the dead is, that the daughter should have it, law and conscience will so too (l).

Devise to
one's Relations.

A man devised his personal estate *for the use of his relations*, without specifying any in particular, or using any other words, and made an executor, and died. His mother and three sisters brought their bill, as nearest relations, for a discovery and account of the personal estate, and to come in according to the statutes for distribution. And it was agreed to be the rule, in construction of such devises to relations, that those who would by the statutes for distribution be entitled to the personal estate, in case the testator had died intestate, should, upon such general devises, be admitted in the same proportion only. And the Lord Chancellor Cowper said, he thought it the best measure for setting bounds to such general words, and that it had been often ruled accordingly in that court (m).

For if upon such general devise they were not to take in this manner, it would be uncertain; for the relations may be infinite. And in the case of *Carr v. Bedford*, 30 Car. 2 (n), where the testator devised the residue of his estate *among his kindred according to their most need*; it was determined that this shall be construed according to the statute of distribution.

So in the case of *Thomas v. Hole*, M., 1734 (o), a man devised 500*l.* to the *relations of A. to be divided equally between them*. A. had, at the testator's death, two brothers living, and several nephews and nieces by another brother; it was determined, that no relations should take by this description that could not take by the statute of distribution.

[The result of all the cases is, that where a legacy is left

& E. 716; *Doe d. Chillcott v. White*, 1 East, 33; *Marquess of Tichfield v. Horncastle*, Rolls, Trin. T. 1838, 2 Jur. 610, Langdale, M. R.]

(i) Bunb. 187. [See recent cases, *Tullet v. Armstrong*, 4 Jur. 34; *Scarborough v. Borman*, *ibid.* 38; *Ryecraft v. Christy*, *ibid.* 599; *Ankers v. Sandford*, *ibid.* 817, 1151;

and Cases on Separate Estate, by Sweet.—Ed.]

(k) 2 P. Wms. 316.

(l) Terms of the Law, "Devise."

(m) *Roach v. Hammond*, E. 1715, Prec. Cha. 401; 2 Abr. Eq. Ca. 438.

(n) 2 Cha. Rep. 146; 2 Abr. Eq. Ca. 365.

(o) Cas. Talb. 251.

generally "to my relations," the money will be distributed according to the statute of distribution (p).—ED.]

Devise to
one's Rela-
tions.

Whether the *wife* is a relation in this respect has been made a question. As in the case of *Davis v. Bailey*, Feb. 8, 1747. The testator by his will gave the residue of his personal estate to his wife for life, remainder to such of his relations as would have been entitled by the statute in case he had died intestate. The wife claimed a moiety. By the Lord Chancellor Hardwicke: Relation here means kindred; the wife is not of kindred, nor a relation within the meaning of the statute.

And, more particularly, in the case of *Worsley v. Johnson*, M., 27 Geo. 2 (q). The testator, seised in fee, deviseth his estate to his wife for life, remainder to another in tail, and for want of issue, the reversion in fee to be sold, with these words: "*And my mind is, that the money arising from the sale, be divided amongst such of my relations, and in such manner, as the statute of distributions directs.*" Then he gave other legacies to his wife, and appointed her sole executrix, and died, leaving relations of his own blood, and his said wife, who married a second husband. Then the wife dies, and the second husband dies, and the tenant in tail dies without issue. The plaintiff brings his bill, as executor to the second husband, praying a sale of the estate, and a moiety of the money thence arising, as the representative of the second husband to the wife, who is entitled to it by the will, as a relation within the statute of distribution. Lord Chancellor Hardwicke: "During the course of this cause I have altered my opinion. The question arises on the words of the will referring to the statute of distribution, and depends upon the construction, which must be agreeable to the words, and to the intent of the testator to be from thence collected. The question is, what is the sense of the word *relation*, as used in this will. In a proper grammatical sense it denotes a quality in the abstract; but, in common sense, it becomes personal, and signifies the same as *my kindred*. Now, *next of kindred* are the words in the statute to which he refers, and takes in only relations by consanguinity or by blood. Now it seems strange to say, that a man's wife is no relation to him, but she certainly is not in this sense neither by blood nor affinity. The etymologists, when they speak of *consanguinity*, say, that it is *vinculum personarum ab eodem stipite descendendum*; and of *affinity*, they say, *uxor non est affinis, sed causa affinitatis*. And so the word appears to be used in our statutes; for if the wife was of kin to her husband, she would exclude all the rest, as being the nearest of kin. So

(p) [*Roach v. Hammond*, Prec. Cha. 401; *Withorn v. Harris*, 2 Ves. sen. 527; *Green v. Howard*, 1 Bro. C. C. 31; *Rayner v. Mowbray*, 3 Bro. C. C. 234; *Brandon v. Brandon*, 3 Swanst. 319; *Wright v. Atkins*, 1 Turn. & Russ. 161, n. So in a case of bequest to A. and his legal representatives, *Cotton v. Cotton*, 2 Bur. 67.—ED.]

(q) 3 Atk. 758.

in the 21 Hen. 8, c. 5, the ordinary shall grant administration to the widow, or next of kin, which distinguishes the wife from the kindred. This perhaps would be too nice a construction of the will, unless the manifest intent of the testator would warrant it; for wills are to be construed according to common understanding, and not by nice grammatical distinctions. Now in this will he has made an ample provision for the wife; and whenever he gives her an interest, he expressly mentions her. It was probable that this remote contingency would not happen in her life, and he could never intend, that her representative, such as the executor of a second husband, should carry so considerable a share from his own blood. Suppose he had said, *my own relations*, he would certainly be construed to mean his relations by blood. Therefore, in this strict sense of the words, the wife is not entitled to any share. And I continue in the same opinion I was of, in the case of *Davis v. Bailey(r)*, which is expressly to this point; and therefore I dismiss the bill, but without costs (s)."

Kindred.

[Generally, it should be observed, that the word "kindred," in its proper signification, means such persons as are related *by blood*. We have seen in the case of *Worsley v. Johnson*, that a wife is not entitled under the term "relations," and neither husband nor wife are entitled under a bequest "to the next of kin (t)," to either of them; but a wife, though *primâ facie* excluded by this description, may be included, if a review of the whole will show such to have been the manifest intention of the testator (u).

Half-blood.

[Persons related to the testator by the *half* are equally of "kin" to him with those of the *whole* blood, and equally entitled, with respect to the description of "nearest of kin" in a will, to every preference over the more remote kindred of the testator (x).

Next of Kin.

[The result of all the authorities, as to what kin the description "next of kin" extends, seems to be, that where there is no evidence that the testator had reference to the statute of distributions, or to a division, as in case of intestacy, the nearest of kin only are entitled (y).—ED.]

Devise to younger Children.

If money be devised to younger children, where there are divers daughters and a son, and the son is by birth a younger child, but heir at law to the inheritance, the son shall not be considered as a younger child, so as to take by the devise (z).

(r) 1 Ves. sen. 84.

(s) [1 Rep. Leg. 108, 3rd edit.]

(t) [Nicholls v. Savage, cited in Bailey v. Wright, 18 Ves. 52.]

(u) [Garrick v. Lord Camden, 14 Ves. 382, Lord Eldon.]

(x) Collingwood v. Pace, 1 Vent. 424; Brown v. Wood, Alleyn, 36.]

(y) [Elmsley v. Young, 2 M & K. 780, Lords Commissioners Shadwell and Bosanquet, and see Sir W. Grant's remarks in Smith v. Campbell, 19 Ves. 404; and the recent case of Clapton v. Bulmer, 4 Jurist, 288.]

(z) Bretton v. Bretton, 12 Car. 2, 1 Abr. Eq. Ca. 202.

Reeves v. Brymer (a). Grandchildren may take under the description of children; but they are only entitled from necessity; as if the will would otherwise be inoperative: or where by other words, as "issue," it clearly appears that the word "children" was used not in the proper but in a more extensive sense (b).

Grandchildren.

[A grandchild *by marriage* is not entitled under the description of "grandchildren" (c).

[And it seems to be now established, that where provisions are made for younger children, to the exclusion of an eldest son, and a younger son becomes an eldest before the time of vesting, or (according to the language used in some of the authorities) before the time of distribution, such younger son is to be excluded (d).—ED.]

Younger Children.

In the case of *Beale v. Beale*, H., 1713 (e), the testator, being tenant in tail, had power by deed or will to charge the lands with 2000*l.* for portions *for younger children living at his death*. He had only two daughters, and the younger was born after his death. He charged the lands by his will for raising this 2000*l.* And the question was, whether it should be raised. It was objected, that the *elder* daughter was not entitled to any part of it, because it was only to go to the *younger* children, and the *younger* daughter cannot claim any part of it, because she was not *living at the time of his death*. But by the Lord Chancellor Harcourt: "The eldest daughter, though first born, when there is a son, hath been often ruled to be a younger child. Every one but the heir is a younger child in equity; and the provision which such daughter will have is but as a younger child's, in regard the son goes away with the land as heir: so here, the estate goes all to the remainder-man, who is *hæres factus*, and neither of the two daughters is heir." And as to the younger daughter, he said, "It would be very hard in a court of equity, that a child, because it happened not to be born at such a time, must therefore be unprovided for; but the law so far regards an infant (f) in *ventre sa mere*, as in this respect to look upon it as living at the time of the father's death" (g).

(a) 4 Ves. 692.

(b) *Radcliffe v. Buckley*, 10 Ves. 195; [4 Mylne & Cr. 60; *Lord Orford v. Churchill*, 3 Ves. & Bea. 59, Sir W. Grant; and see the recent case of *Peel v. Catlam*, 9 Sim. 372.—ED.]

(c) [*Hussey v. Berkley*, 2 Eden, 196, Lord Northington; cf. with *Lord Orford v. Churchill*, 3 Ves. & B. 59.]

(d) [*Chadwick v. Doleman*, 2 Vern. 528; *Teynham v. Webb*, 2 Ves. sen. 198, 210; *Hall v. Hower*, Amb. 203; *Loder v. Loder*, 2 Ves. sen. 526; *Broadmead v. Wood*, 1 Bro. C. C. 77;

Matthews v. Paul, 3 Swanst. 334; *Savage v. Carroll*, 1 Ball & B. 265; *Windham v. Graham*, 1 Russ. C. C. 331: and as to *younger* branches of a family, see *Doe v. Flemming*, 2 Cr., Mees. & R. 638.—ED.]

(e) 1 P. Will. 244.

(f) [And if the father leave money to it *as a posthumous* child, and happen to survive its birth, it will still be considered a posthumous child within the meaning of the will; *Jaggard v. Jaggard*, Pre. Ch. 177.—ED.]

(g) [See also the cases of *Butler v.*

Natural
Children.

[Where there are legitimate children to answer the description of "children," the rule of law is, that legitimate children only will take (*h*): but natural children who have acquired the reputation of being the children of a particular person prior to the date of the will, are competent to take under the description of children (*i*).—ED.]

Estate equally
to be divided.

March 2, 1738, *Owen v. Owen* (*j*). The testatrix devised the residue of her personal estate to her two nieces, *equally to be divided between them*, and appointed them executrixes accordingly. One of the nieces died in the life of the testatrix. The question was, whether a moiety of the residue should go to the next of kin as undisposed of by the will; or the devise to the two nieces was a joint-tenancy, and the whole residue should go to the surviving niece. By the Lord Chancellor Hardwicke: "It is clear to me, that if both of the nieces had been living, the words *equally to be divided* would have made a tenancy in common and not a joint-tenancy; for though these words in a strict settlement at common law have never been determined barely of themselves to make a tenancy in common, yet in a will it is settled that these words will make a tenancy in common, both with regard to real and personal estate."

Rigden
v.
Valier.

In the case of *Rigden v. Valier*, March 25, 1751 (*k*), the question arose on a deed poll, which began in this manner: "To all Christian people, &c. I, George Everinden, in consideration of natural love and affection, &c., and for the firm settling and assuring of all my real and personal estate on my wife and children after my decease, dispose thereof in the manner following: I give, grant and confirm to my daughter Margaret, &c. [This was not in question.] Also, I give, grant and confirm to my two daughters, Margaret and Hannah, the rents and profits of the land called W., during the life of my wife, *equally to be divided betwixt my said daughters, paying to my wife — per annum; and after her decease, to them and their heirs, equally to be divided betwixt them*. Also, I give, grant and confirm to my five daughters all my personal estate, *equally to be divided betwixt them, after all my debts and funeral charges paid and satisfied*." This deed was signed and sealed by George Everinden, in the presence of three witnesses. He

Duncombe, 1 P. Wms. 449; *Heneage v. Keenloke*, 2 Atk. 456; *Pierson v. Garnet*, 2 Bro. C. C. 38; *West v. The Lord Primate of Ireland*, 3 Bro. C. C. 148; *Spencer v. Spencer*, Lord Langdale, M. R., 2 Keen, 689; and the recent case of *Scarisbrick v. Eccleston*, 5 C. & Fin. 398; and as to children entitled to residue, *La Roche v. Davies*, 3 You. & C. 612; *Jarvis v. Pond*, 9 Sim. 549.—ED.]

(*h*) [*Bayley v. Mollard*, 1 Russ. & M. 581.]

(*i*) [*Wilkinson v. Adam*, 1 Ves. & Bea. 422—454. See also *Earle v. Wilson*, Sir W. Grant, 17 Ves. 528, 532; and *Gordon v. Gordon*, 1 Meriv. 141; *Dawson v. Dawson*, Madd. & Geld. 292.]

(*j*) 1 Atk. 494.

(*k*) 2 Ves. 252.

and his wife died. Hannah, one of the daughters, married Rigden, by whom she had the plaintiffs, and died. The question was, whether Margaret and Hannah took as joint-tenants or as tenants in common. If the latter, the plaintiffs, who brought their bill for an account of the rents and profits of a moiety of the estate given to Margaret and their mother Hannah, and claimed as coheirs of Hannah, were right. If the former, the whole survived to the defendant Margaret, as the survivor of her sister. By the Lord Chancellor Hardwicke: "This case depends upon a deed or writing, which, though executed as a deed, I am not sure was intended to take effect as such. It begins as a deed poll: but it is a disposition of the whole real and personal estate of Everinden, and to take place from his decease, and in consideration of the natural love and affection he bore to his wife and children. If it be not construed as a will or covenant to stand seised (and being in consideration of natural love and affection, though by a single deed without livery, it may be considered to be a covenant to stand seised), it will be void, being without livery, and because a freehold cannot pass *in futuro*. But by way of covenant to stand seised it may be good; for that operates not by transmutation of the possession, but the use remains in the grantor till taken out of him by force of the consideration. The present question arises upon a very litigated point in the books, though clear enough in one view. In a *will*, the words *equally to be divided* certainly create a tenancy in common, though this at first was doubted; nay, the words *equally* or *share and share alike* have the same effect. But it is said that there is not sufficient authority to establish these words to make a tenancy in common in a *deed*, and that the books take the law to be otherwise. It is true the books do so generally; and yet there is no solemn determination that I can find, where it has been adjudged against a title, that the words *equally to be divided* will not create a tenancy in common in a deed. The only determination that hath been, was in the case of *Fisher v. Wig (l)*, which hath been relied on as a judgment of the Court of King's Bench, that these words make tenancy in common in a deed. But it is objected that this is a case of doubtful authority, being on the opinion of only two judges against so great a man as Lord Chief Justice Holt; and it is apprehended, too, that this judgment was afterwards reversed. I have made inquiry, and cannot find that it was, or that even a writ of error was brought; so that this judgment yet stands, and is so far an authority that this construction in regard to the words *equally to be divided* making a tenancy in common, took place in the case of the surrender of the copyhold lands. Another case has been cited

Estate equally
to be divided.

Rigden
v.
Valier.

(l) Lord Raym. 623; 1 P. Will. 14.

Estate equally
to be divided.

Rigden
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Valier.

at the bar, which, if rightly reported, is in point, 2 Vent. 361. But I have caused the register's books to be searched, and can find no decree to warrant the report; but notwithstanding this, there might have been such a case, and it is taken by Gould that there was. Another case is mentioned at the end of *Fisher v. Wig*, by Northey; but the records have been searched, and there is no possibility of finding it. *Smith v. Johnson* too is another authority, such as it is. In regard to the case before me, upon the best consideration I can give it, I am inclined to be of opinion that the deed or instrument, call it what you will, has created a tenancy in common; and that to say otherwise would be a manifest contradiction to the intention of a father providing for his children. Though none has a greater reverence for the opinion of Lord Chief Justice Holt than I have, I think the arguments of the other judges are founded more on the reason and nature of the thing than his lordship's; and that his proceeded from the artificial and refined reasoning of the law, and are deduced from a great deal of fine learning drawn from argument in other cases. The arguments of Mr. Justice Gould have great weight, and are by no means satisfactorily answered. Indeed that case was on a surrender of copyhold lands in the lord's court; and the two judges argued it was not to be considered with great strictness, but as a will: whereas Holt contended that it should be construed as a deed; and in one thing he is certainly right, that the surrender of copyhold lands to uses is not to be considered on the foot of uses, being not within the statute of uses; and therefore such a surrender is only a direction of the lord whom to admit; and when admitted, the surrenderee is not in by the grant of the lord but by the surrender. If the arguments of the judges had any weight in that case, they must have full as much in this, being on a covenant to stand seised. But it is objected that there is no warrant to construe a deed to uses, as to the limitations and words of it, with greater latitude than a conveyance by way of feoffment or any other conveyance at common law; and that strange confusion would arise if the words of a deed on the Statute of Uses should be taken in a larger sense than they would bear in a conveyance at common law. This is true in general; for the statute joining the estate to the use, it becomes one entire conveyance by force of the statute. But some restriction must be added to this. The words of limitation, to be sure, must be construed in the same sense as at common law. But when there are words of regulation or modification of the estate (as the words *equally to be divided* are), and not words of limitation, I think there is no more harm in giving them a greater latitude in deeds on the statute of uses, which are trusts at common law, than in feoffments, which at all times have been strict conveyances. The case upon that occasion cited by Gould is very material, where the intendment, not the

words, of the special verdict influenced the determination. Consider the argument from thence to the present case. The only distinction taken between the construction of words in a special verdict and in other cases, is, that in a special verdict they may be taken more largely than in pleading; and therefore it is often said, that a description which would be bad in a count or plea may be good in a verdict, and taken by the intendment of the jury: but there never was any book that said that words may be taken more loosely in a special verdict than in a deed. It is admitted that if the deed had been in this manner, to hold one moiety to one and her heirs, and the other moiety to the other and her heirs, this had been good, not only in such a deed as this, but likewise in a feoffment. And considering how the sense of the words *equally to be divided* is to be construed, there is no reasonable difference between the two cases. Thus the matter stands on the foot and authority of *Fisher v. Wig.* But there are other reasons which greatly strengthen the present case in favour of the plaintiffs. The first is this: here is a parent making a provision for his children (who were five in number) and for his wife; if the children were to take this estate intended for the support of each of them and their future families, as joint-tenants, the share of any one who should happen to die would not descend for the maintenance of his children and posterity, but survive to the other joint-tenants, a disposition by no means reasonable, nor likely to be supposed agreeable to the intention of the father. And this court has always used a great latitude in pursuing the intent of the parties, in construing a deed to make a tenancy in common or a joint-tenancy, though the words *equally to be divided* have been omitted; and have determined therefore that if two men jointly and equally advance a sum of money on a mortgage in fee, and take a security to them and their heirs, there shall be no survivorship; and so if they foreclose an estate, it shall be divided betwixt them, because their intention is supposed to be so. It has been said, indeed, if two men make a purchase, they may be supposed to buy a kind of chance between them, and to intend that the survivor shall be entitled to the whole. But it has been determined, that if two purchase, and one advance more than the other, there shall be no survivorship, though there be no such words as *equally to be divided*, or to hold as tenants in common; which shows how strongly the courts have leaned against survivorship, and erected a tenancy in common, by construction, or the intention of the parties. Consider how nearly this comes to the case in question: and this court always considers provisions for children as having an equitable consideration; and therefore, though such voluntary dispositions cannot be preferred to debts for valuable consideration, yet they are always preferred to other voluntary

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dispositions. But George Everinden has himself put his own construction on the words, by the disposition of his *personal* estate, which is allowed to make a tenancy in common. Besides this appears to be as near a testamentary act as possible, nor do I know why it may not be proved as a will, notwithstanding the solemnity of the execution by sealing and delivery; according to the case of *Kibbet v. Lee* (l), and a late determination in the King's Bench in the case of *Trimmer v. Jackson* (m). And it is admitted that in a will these words make a tenancy in common, and I think it ought to be so here. My opinion therefore at present is, that agreeable to the case of *Fisher v. Wig*, strengthened by the farther observations already made, the plaintiffs are entitled to a division of the estate."

Goodtitle
v.
Stoakes.

So in the case of *Goodtitle v. Stoakes*, in the King's Bench, H., 26 Geo. 2. By indentures of lease and release, dated in the year 1695, and made between John Gurl and his wife of the one part, and William Purefoy and Peter Capper of the other part, the said John Gurl granted and released to the said Purefoy and Capper, and their heirs, the lands in question, to the use of such and so many of the children of the said Gurl, on the body of his said wife begotten, in such manner, and in such shares, as the said John Gurl should appoint; and in default of such appointment, *to the use of all such children equally to be divided*, with a remainder to the right heirs of the said John Gurl. John Gurl died without making any appointment, leaving his widow and children, Richard, Jane, Peter, and Wilmot. The question was, whether by the words "*to the use of all such children equally to be divided*" the children took as tenants in common, or as joint tenants, in which case Wilmot, who married the defendant, being the only surviving child, would take the whole. Lee, C. J., delivered the opinion of the court: "This case depends upon the clause (above-mentioned). The defendants have insisted they ought to take as joint tenants. Joint tenants must be to the land in one right, and by one joint title, and they must have one joint freehold. Tenants in common take differently, as is laid down, 1 Inst. sects. 292, 296, 297, from which it does appear, that no particular words are necessary to create a tenancy in common. The question then comes to this, Whether the children do not take several freeholds, with a several occupation? To make them tenants in common would be to construe every word in this deed as operative. No words in a devise or a grant shall be construed void if they can be construed otherwise consistently (n). There is no doubt at this time of day but that the words *equally to be divided*, in a will, make a tenancy in common. In the case in Cro. Eliz. 443, 695, it was first deter-

(l) Hob. 313.

(m) *Vide ante.*

(n) 3 Lev. 373.

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vided.

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mined to be so. There is no determination where in a deed to uses they will. It has been objected, they have a joint title in the freehold, and the words *equally to be divided* will not sever it. And though the statute of uses executes the use to the possession, yet it leaves the estate subject to the same uses. The intent cannot prevail here: and these words in a conveyance at common law would not create a tenancy in common. But the question here is, not whether the joint title is severed, but whether any joint title is conveyed. If land be given to A. and B. to hold one moiety to A. and his heirs, and the other moiety to B. and his heirs, they take as tenants in common. And where the grantor, in the same clause, and *uno flatu*, uses the words *equally to be divided*, he intends to convey an equal property in the land, and to the fee, to each. This is the opinion of Popham (o) in his argument. I cannot think the clause here is nugatory, or of no effect. The intent of the party operates to pass the whole fee. There is no rule in law to prevent the court from making a construction, according to the intent of the party, in a deed. The true reason why the words *equally to be divided* make a tenancy in common is from the apparent intent that the estate should be divided. And such a construction ought to be made if there be no rule to the contrary; and no precise words are necessary. The case in 2 Ventr. 365, is in point: A covenant to stand seised to the use of A. for life, and after to two, equally to be divided (p). If a verdict find that a man hath two parts of a manor, or the like, to be divided into three parts, they are tenants in common by the intendment of the verdict; and if in a verdict, there is no reason why not in a deed (q). A conveyance by way of use shall be construed as a will with respect to the intention of the parties. The case of *Fisher v. Wig* cannot now be departed from; it is mentioned in the case of *Philips v. Stringer*, as if this judgment had been reversed, but it was not. The whole reasoning of Holt's argument, in the said case of *Fisher v. Wig*, is applied to the supposition of a conveyance at common law, but it does not from that appear what his opinion would have been upon a direct deed to uses as here. In the case of *Rigden v. Valier*, Lord Hardwicke, C. J., declared upon the best consideration he could give the case, that he was inclined to think that the words *equally to be divided*, whether in a will or deed, create a tenancy in common." And judgment was given for the plaintiff by the whole court.

Residue to be
equally di-
vided.

And in the case of *Peat v. Chapman*, Aug. 3, 1750 (r), the testator devised all the rest and residue to be divided betwixt two. By Sir John Strange, Master of the Rolls: This must be understood to be *equally* divided, and is a tenancy in common; and by the death of one in the life of the testator, his moiety shall not survive to the other devisee of the residue, but

(o) Cro. Eliz. 696.

(p) 1 Inst. 191, a.

(q) *Leigh v. Brace*, Carth. 343.

(r) 1 Ves. 542.

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of the Resi-
due when
Gift to a
Class.

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be considered as undisposed of by the will, and divided among the next of kin as if no devise thereof had been (r).

[The disposition of the residue is sometimes considered a *gift to a class*. In *Barber v. Barber* (s), Lord Cottenham reviewed several of the cases on this subject, expressing himself as follows:—

["The question to be decided is, who are the legatees? It is quite clear that, if the legatees had not been appointed executors, the gift to them would have created a tenancy in common, and therefore that, upon the failure of the gift to any one, his share would have been undisposed of, and that the three others could not have claimed. And it is equally clear that, if any other condition had been imposed upon these four tenants in common, upon which their title to the legacy was to depend, and one had refused to perform the condition, his share would have been undisposed of, and that the other three could not have claimed it. The ground upon which the title of the executors who proved is rested leaves these propositions untouched; for it stands upon this ground, that the gift is to a class, and that the three executors who proved constitute the class; and it was contended that there was no distinction between a gift to executors as tenants in common, and a gift to certain persons as tenants in common who are afterwards appointed executors.

["This, as all other questions of construction, must depend upon the intention. *A gift to a class implies an intention to benefit those who constitute the class, and to exclude all others; but a gift to individuals, described by their several names and descriptions, though they may together constitute a class, implies an intention to benefit the individuals named.* In a gift to a class you look to the description, and inquire what individuals answer to it; and those who do answer to it are the legatees described. But if the parties to whom the legacy is given be not described as a class, but by their individual names and additions, though together constituting a class, those who may constitute the class at any particular time may not, in any respect, correspond with the description of the individuals named as legatees. If a testator give a legacy to be divided amongst the children of A. at a particular time, those who constitute the class at the time will take; but if the legacy be given to B., C., and D., children of A., as tenants in common, and one die before the testator, the survivors will not take the share of the deceased child. The question must be, was the intention to bequeath to those who might, at the time, constitute the class, or to certain individuals who, it was supposed, would constitute it? Such would appear to be the question to be asked, and the point to be ascertained; but the more

(r) [See the recent cases of *Powell v. Davis*, 1 Beav. 532; *Ex parte Hunter, re Birmingham and Derby Railway Act*, 3 You. & C. 610; *La Roche v. Davies*, *ibid.* 312, *in notis*; *Jarvis v. Pond*, 9 Sim. 549.—ED.]
(s) [3 Mylne & Cr. 688.]

important inquiry is, whether the authorities justify and support this view of the case.

[“ In *Page v. Page* (*t*), decided by Lord King in 1728, and approved by Lord Talbot in 1734, there was the gift of a residue to six persons, to each one-sixth; and they were appointed executors. It was held that the one-sixth of one who died in the lifetime of the testator lapsed for the next of kin. In this case there is a gift to four equally, to be divided betwixt them, *i. e.* to each one-fourth. In *Owen v. Owen* (*u*) the testator gave the residue of his estate to his two nieces, to be equally divided between them, and appointed them executrixes. One died in the testator’s lifetime; and Lord Hardwicke said that he had followed *Page v. Page* in *Holderness v. Reyner*; and that the reasoning of Sir J. Jekyll, in *Hunt v. Berkley*, could not be supported; and held that the share intended for the deceased niece lapsed for the benefit of the next of kin, and did not go to the surviving niece.

[“ In *Knight v. Gould* (*x*), the gift was of the residue ‘to my executors hereinafter named, to pay my debts, legacies, &c., and also to recompense them for their trouble, equally between them;’ and three persons were then named executors, one of whom died in the testator’s lifetime; and Sir John Leach first, and Lord Brougham, upon appeal, held, that the two survivors were entitled to the whole (*y*). The latter relied upon two grounds principally, first, that the persons to take were those who were to perform the duties, and the survivors were such persons; secondly, that the gift was to the executors as a class in terms; for the words ‘hereinafter named’ were mere surplusage, inasmuch as the result would have been the same if they had been omitted, it being absolutely necessary to name them in order to appoint them. In that case the gift was to executors described as such; in this, it is to individuals particularly named and described. In that, the fund given was what should remain after part had been administered. Those who were to take and those who were to administer were considered as identical.

[“ The result, therefore, of the authorities, supposing them strictly to apply, is in favour of the claim of the next of kin. There is the case of *Page v. Page*, decided by Lord King, and approved by Lord Talbot, and in two cases approved and acted upon by Lord Hardwicke; whereas, in support of the claim of the acting executors, there is only the case of *Hunt v. Berkley*, decided, indeed, by a high authority, Sir Joseph Jekyll, but disapproved by Lord Hardwicke, and overruled by every subsequent case in which the point has arisen. It is also to be observed that the case of *Hunt v. Berkley* would not, if it were clearly a right decision, necessarily govern the

(*t*) [2 P. Wms. 489.]

(*u*) [1 Atk. 494.]

(*x*) [Mos. 47.]

(*y*) [2 Mylne & Keen, 295.]

Disposition
of the Resi-
due when
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Class.

present case; because, in that case, the residuary legatees and the executors were the same, and the decision must have proceeded upon this, that the testator did in fact intend to give the residue to whomsoever of the parties named might be his executors. But it is clear that, if *Page v. Page*, *Holderness v. Reyner*, and *Owen v. Owen*, be right, they necessarily include the present case; the claims of the next of kin being much stronger in this case than in any of those; inasmuch as, in all those cases, those named residuary legatees and executors were the same; so that the question might arise, whether the intention was to give the residue to the individuals, or to the class which they composed; whereas, in the present case, the residuary legatees do not constitute any class to which a name can be given, without including the description of residuary legatees. If the three surviving executors to whom the share of the residue was given are entitled, they must be so entitled as constituting the class intended to be benefited; but what is the class which they so constitute? Not the executors? because there were two other executors named besides the persons intended to be so benefited; and although the two others also declined to prove, so that the three, in fact, are the only acting executors, yet the class of executors, as contemplated by the testator, consisted of six; and there was clearly no intention to give the benefit to such of the six as might act as executors, for that might have given the benefit to the two. This case, therefore, has nothing in common with *Knight v. Gould*, or any other case in which the gift has been construed to be in favour of such as might act as executors. If, then, the class intended to take be not such as might at the time be the executors, it must be such of the executors named as might at the time be also of the number of the residuary legatees named; but that is only another mode of describing the residuary legatees; and, if their situation as residuary legatees be considered, they are only tenants in common of the residue, between whom there can be no survivorship.

[“ There seems also to be some confusion in terms in considering legatees as constituting, as such, a class for the purpose in question. They have no existence as a class except under the description in the will. To such persons a testator may undoubtedly give a right of survivorship *inter se*, by expressly directing it, or by creating a joint tenancy. The first the testator in this case has not done, and the second he has, in terms, excluded, by creating a tenancy in common; and he could not have intended that those who proved should take the whole in the event of some not proving, and not in the event of their dying before him. To effectuate a gift to those of the class he has himself constituted, who may be in a condition to take at a particular time, he must have used expressions from which that intention may be fairly deduced. Such an intention cannot be deduced from a gift to four persons by

name, between whom the share of the residue is to be divided.”
—ED.]

Perkins v. Baynton (z). Frances Nott gave by her will, “to S. B. and W. B. 1500*l.* jointly and between them.” W. B. survived S. B., and insisted that the joint legacy survived, and that he was entitled to the whole. But by Lord Thurlow, C.: “The one word here is *jointly*, the other *between them*; they must be so put together as to effectuate the intent. In *Haws v. Haws* (a) it is laid down, that if words are so inconsistent that they cannot stand or be reconciled together, the court must reject those words which are least consistent with the intention of the testator. The intent here was to give to each an usable interest, as it is a sum of money which resolves between them;” and his lordship decreed that the survivor was not entitled to the whole legacy.

A Legacy
“jointly and
between”
two Per-
sons.

A devise of all a man’s goods and mortgages to his executors, is a good devise, and will pass all the lands mortgaged; for the equity of redemption passeth to the devisee (b).

Devise of
Mortgages
passeth the
Lands.

But by a general devise of all lands, tenements and hereditaments, a mortgage in fee shall not pass, unless the equity of redemption be foreclosed; and if after such devise made, a foreclosure is had, yet such estate shall not pass by those general words of lands, tenements, and hereditaments, because a foreclosure is considered as a new purchase of the land. The interest of the land must be somewhere, and cannot be in abeyance; but it is not in the mortgagee, and therefore must remain in the mortgagor. If a man devises his estate, and after makes a mortgage in fee, it is a total revocation in law, yet in equity it is a revocation only *pro tanto*. And the mortgagee, with regard to the inheritance, is a trustee for the mortgagor till a foreclosure (c).

[As to whether *securities for money* will pass the legal fee in lands, see *Renvoise v. Cowper* (d), and *Matter v. Thomas* (e), in which the vice-chancellor obtained an opinion from the judges of the Common Pleas.—ED.]

By the word *lands*, an advowson will not pass: but by *hereditaments* it may (f).

Advowson,
Tithes, Fee
Farm Rents.

But fee farm rents, portions of tithes, or any other right out of lands, will pass by a devise of lands (g).

Where lands are appointed to be sold, and it is not said by whom, the executor ought to sell, because he is the person entrusted with the execution of the will (i). And a court of equity will compel the heir at law, and all other proper parties, to join in the sale (k).

Lands to be
sold (h).

(z) 1 Bro. 118.

(a) 3 Atk.

(b) God. O. L. 477; Cro. Car. 37.

(c) 1 Atk. 605; 2 Bac. Abr. 83.

(d) [Madd. & Geld, 371.]

(e) [6 Sim. 115; 10 Bing. 44.]

(f) Fortesc. 351.

(g) Viner, Devise, K.

(h) *Vide post*, “Payment of Debts.”

(i) Law of Test. 121; Law of Ex. 221.

(k) 1 Atk. 490.

Lands to be
sold.

H., 26 Eliz., *Vincent v. Lee* (l). A special verdict was found, that A. was seised of certain lands in fee, and devised the same in tail, and if the donee died without issue, that his said lands should *be sold by his sons in law*, he in truth having five sons in law; one of his sons in law died in the life of the donee, and after the donee dieth without issue, and then the four of the sons in law sold the land: and it was adjudged that the sale was good, because they were named generally, by his sons in law, and the lands could not be sold by them all; and the words of the will, in a benign interpretation, are satisfied in the plural number, albeit they had but a bare authority. But if they had been particularly named, it had been otherwise.

But if a man deviseth lands *to his executors to be sold*, and maketh two executors, and the one dieth, yet the survivor may sell the land, because as the estate, so the trust shall survive. And so note a diversity between a bare trust, and trust coupled with an interest (m).

Yet in neither of those cases, albeit one refuse, can the other make sale to him that refused; because he is party and privy to the last will, and remaineth executor still (n).

And hereupon Lord Coke says, his advice to them that make such devises by will, in order to make it as certain as they can, is, that the sale be made by his executors or the survivors or survivor of them, if his meaning be so, or by such or so many of them as take upon them the probate of his will, or the like. And it is better to give them an authority than an estate, unless his meaning be they should take the profits of his lands in the mean time, and then it is necessary that he devise, that the mean profits till the sale shall be assets in their hands; for otherwise they shall not be so (o).

For where the testator deviseth that his *executors shall sell his land*, there the land descendeth in the mean time to the heir: and until the sale be made, the heir may enter and take the profits. But when the land is devised *to his executor to be sold*, there the devise taketh away the descent, and vesteth the estate of the land in the executor, and he may enter and take the profits, and make sale according to the devise. And in such case the executor is bound to sell so soon as he can; for that the mean profits taken before the sale shall not be assets; and therefore he might otherwise take advantage of his own laches (p).

Where there is a devise of lands to trustees to sell, to pay debts, the heir shall have the surplus (q).

(l) 1 Inst. 113.

(m) Ibid.

(n) Ibid.

(o) Ibid.

(p) 1 Inst. 236. [The reader is further referred to a very able chapter

on the *Doctrine of Constructive Conversion* in Mr. Jarman's *Treatise on Wills*, vol. i. c. xix; and to Mr. V. Williams on *Executors and Administrators*, p. 513.]

(q) Law of Test. 114.

For whatever interest in, or profits out of a real estate, are undisposed of by a testator, the same shall descend to the heir; and he takes them not by the will, or the intent of the testator, but they are cast upon him by the law, for want of some other person to take(r). Resulting Trust as to the Surplus for the Heir.

Thus, the testator by will devised all his lands to trustees to sell, and dispose of the money as he by writing should appoint; and for want of such appointment, to his four nephews. The testator by writing appoints his trustees to pay several sums to several persons, but not to near the value of the land. It was held that the nephews should not have the residue, but that the heir at law should have it, as an interest resulting, and not disposed of(s).

A person devised his real estate to his executors, to be sold for payment of debts; the surplus, if any be, to be deemed personal estate, and to go to his executors, to whom he gave 20*l.* a piece. It was decreed, that the surplus should be a trust for the heir at law. And the same was afterwards affirmed in parliament(t).

Where a testator directs his real estate to be sold, and the produce blended with his personal, and wills the whole away, equally disregarding his heir and next of kin; if any of the legatees die before the testator, such part of their legacy as arose from the realty shall result to the heir at law; and such as arose from the personalty shall go to the next of kin(u).

The testator devised to his nephew several lands, to hold to him and his heirs for ever, in trust to be sold for payment of all his debts and legacies, within a year after his death, and made him executor, but gave him no legacy.

It was held, that there was no resulting trust for the heir at law; for then the executor, who is taken notice of as his nephew, would have nothing for his trouble(v). [But where a testator directs his personal estate to be converted into real for several purposes, some of which fail, the heir is not, after satisfying the purposes which can take effect, entitled to the personalty, as being impressed with the character of realty(x).

[The doctrine to be inferred from all the adjudged cases is, that where a real estate is devised in fee upon trust for a person incapable of taking, or who is not sufficiently defined, or who dies in the testator's lifetime, or who disclaims the estate, the beneficial interest in the estate so derived results to the heir at law(y); and that as legacy to such heir does not exclude

Doctrine of all the Cases.

(r) Cas. Talb. 44.

(v) *Cunningham v. Mellish*, Prec.

(s) *City of London v. Garway*, 2 Vern. 571.

Ch. 31; 2 Vern. 247.

(t) *Countess of Bristol v. Hungerford*, 2 Vern. 645.

(x) [*Hereford v. Ravenhill*, 1 Beav. 481.]

(u) *Digby v. Legard*, before Lord Bathurst, 3 P. Wms. 22 n.; *Akroyd v. Smithson*, 1 Bro. 503; *Robinson v. Taylor*, 2 Bro. 589; *Williams v. Coade*, 10 Ves. 500.

(y) [*Wyche v. Packington*, 3 Bro. P. C. Toml. ed. 44; *Hobart v. Countess of Suffolk*, 2 Vern. 644; S. C. 1 Eq. Ca. Ab. 272, pl. 7; *Hartopp's case*, 1 Leon. 253.]

Chattel Interest undisposed of.

him from the resulting trust (z). It should be observed, that where the portion of real estate left undisposed of is a *chattel* interest, it devolves upon the heir as personalty, and is transmissible to his personal representative (a).

Exceptions.

[There is also an exception to the doctrine of resulting trusts in the case of gifts to charity; the rule being, that where lands, or rents of lands given to charitable purposes, which at the time exhaust, or are represented to exhaust the whole rents, and those rents increase in amount, the excess from such increase shall be appropriated to the charity, and not pass as a resulting trust to the heir (b).

[But this question can only be raised upon wills prior to the passing of 9 Geo. 2, c. 26, which prohibited charitable dispositions of lands (c).—ED.]

Lands devised for Payment of Debts, &c.

If lands be devised for *payment of debts*, the executor may sell, though authority be not specially given him; but otherwise, if such devise had been for *legacies* only, or for raising portions, or the like; for in such case there had been no remedy but in chancery against the heir (d).

If lands be devised on trust, *out of the rents and profits* to pay debts and legacies, if the rents and profits will not raise it in a convenient time, the trustees may sell: for the words *profits of lands*, especially when to pay debts or portions, imply any profits that the land will yield, either by selling or mortgaging (e).

If lands be devised to be sold for payment of portions, and one of the children dies after the portion is due, and before the lands sold, the administrator of the child is entitled to the money (f).

For lands devised to be sold, or in trustees' hands, for payment of debts, portions, or the like, are to be deemed as money so far as there are any such to be paid: and so money devised to buy lands, is to be deemed as lands. But with respect to the heir at law or residuary legatee, the lands so given in trust, or devised for payment of debts or legacies, shall be deemed as

(z) [*Starkey v. Brooks*, 1 P. W. 390; *Randall v. Boobey*, 2 Vern. 425; *North v. Crompton*, 1 Cha. Ca. 196; *Haliday v. Hudson*, 3 Ves. 210; *Countess of Bristol v. Hungerford*, 3 Vern. 645, cited above; *S. C.* 1 Eq. Ca. Ab. 272, pl. 7; but these are cases in which the trust has been held not to result, there being an apparent intention to give the devisee a *beneficial* interest as well as a legal estate. *Hill v. Bishop of London*, 1 Atk. 618. See also *Halliday v. Hudson*, 3 Ves. 210. Compare with *King v. Denison*, 1 Ves. & B. 273. See also *Rogers v. Rogers*, 3 P. W. 193; *S. C.* Ca. temp. Talbot, 268.]

(a) [*Levet v. Needham*, 2 Vern. 138; *Wych v. Packington*, 3 Bro. P. C. Toml. ed. 44.]

(b) [*Thetford School case*, 8 Co. 130; *Duke's Chan. Uses*, 71, 28; *Sutton Colefield's case*, 10 Rep. 31; *Attorney-General v. Johnson*, Amb. 190, *Ld. Hardwicke's Remarks*; *Attorney-General v. Mayor of Bristol*, 2 Jac. & Walk. 307, *Lord Eldon's Remarks*.]

(c) [See titles *Charitable Uses*, vol. i. and *Mortmain*, vol. ii. of this work.]

(d) 1 Keb. 14.

(e) 1 P. Will. 415.

(f) 1 Vern. 276.

land; and he may, by paying the debts or legacies, pray a conveyance (g).

Lands devised for Payment of Debts, &c.

So if money be devised to be laid out in land, and settled on a man and his heirs, he may come into court, and pray to have the money, and that no purchase may be made; for no other has any interest in it. But if he die before it is paid or laid out in land, and the question is between the heir and executor who shall have it, the heir shall have it, and it shall be considered as land; first, because the heir in all cases is favoured: and secondly, if the executor should have it, it would be against the words of the will, which gave it to the heir (h).

The purchaser of land is in general not bound to look to the application of the purchase-money (i).

[In *King v. Denison* (k), Lord Eldon said, "If I give to A. and his heirs all my real estate, charged with my debts, that is a devise to him for a particular purpose, but not for that purpose only. If the devise is upon trust to pay my debts, that is a devise for a particular purpose, and nothing more; and the effect of those two modes admits just this difference. The former is a devise of an estate of inheritance for the purpose of giving the devisee the beneficial interest, subject to a particular purpose: the latter is a devise for a particular purpose, with no intention to give him any beneficial interest. Where, therefore, the whole legal interest is given for the purpose of satisfying trusts expressed, and those trusts do not in their execution exhaust the whole, so much of the beneficial interest as is not exhausted belongs to the heir: but where the whole legal interest is given for a particular purpose, with an intention to give to the devisee of the legal estate the beneficial interest, if the whole is not exhausted by that particular purpose, the surplus goes to the devisee; as it is intended to be given to him."

When the Surplus goes to the Devisee.

[It has been much discussed whether, if in a *series of consecutive limitations*, a *particular* estate be void in its creation, the remainders immediately expectant on such estate are accelerated; or whether the interest in question descends to the testator's heir at law as real estate undisposed of. In the case of *Tregonwell v. Sydenham*, decided by the House of Lords (l), it seems to have been decided in favour of the heir at law (m).—ED.]

Devise of a rent charge to his younger son, *towards the education and bringing him up in learning*; it is not conditional, and he shall have the rent, though not brought up in learning, and the words (*towards his education*) are only to show the intent and consideration of the payment of the sum (o).

Devise upon Condition (n),

(g) 9 Mod. 170.

(h) Prec. Cha. 544.

(i) *Smith v. Guyon*, 1 B. 10, 186, and n.

(k) [1 Ves. & B. 272.]

(l) [3 Dow, 194.]

(m) [See Jarman on Wills, vol. i. p. 513.]

(n) [For devises in restraint of marriage, see *post*, p. 209; and condition not to give trouble to executor, *post*, p. 213.—ED.]

(o) 2 Lev. 154.

Devise upon
Condition.

Devise of lands to his wife for life, remainder to his second son in fee; provided, if his third son shall within three months after the wife's death pay 500*l.* to the said second son, his executors or administrators, then he devised them to the said third son and his heirs. The third son died, leaving the wife. Then the wife died. The heir of the said third son may enter upon the lands, upon payment or tender of the 500*l.* It is not a condition, but an executory devise (*o*).

Meaning of
"Executory
Devise," and
of "Contingent Remainder."

Note, *Executory* is said to be where an estate in fee, created by deed or fine, is to be afterwards executed by entry, livery, writ, or the like. Estates *executed* are when they pass presently to the person to whom conveyed, without any after act. And an *executory devise* is, where a future interest is devised that vests not at the death of the testator, but depends on some contingency which must happen before it can vest. If a particular estate is limited, and the inheritance passed out of the donor, this is a *contingent remainder*; but where the fee by a devise is vested in any person, and to be vested in another upon contingency, this is an *executory devise*. And in all cases of executory devises the estates descend until the contingencies happen (*p*).

[It should be further remarked, that it is settled law that when a devise is capable, *according to the state of the objects at the death of the testator*, of taking effect as a *remainder*, it shall not be construed to be an executory devise (*q*).—ED.]

Devise, If my son and my two daughters die without issue of their bodies, then all my lands shall remain and come to my nephew and his heirs. Here no estate is devised to the son and daughters by implication; the words only import a designation or appointment of the time when the land shall come to the nephew, namely, when the son and two daughters shall happen to die without issue, and not before. For no estate being created to the son and daughters, the nephew can take nothing by way of remainder, for that must descend to the heir at law. A remainder cannot depend upon an absolute fee simple, that being but the residue of an estate. For when all a man has of an estate, or anything else is given or gone away, nothing remains, and no other or further estate can be given or disposed, and therefore no remainder can be of an absolute fee simple. Yet, in another respect, an estate in fee may be devised to one, and to be in another upon a contingency, as

(*o*) M., 5 Geo. 1, *Marks v. Marks*, 10 Mod. 420.

(*p*) The reader will find much profound learning on this branch of law, conveyed in an elegant and perspicuous manner, in the writings of the late Mr. Fearne on Contingent Re-

mainders and Executory Devises. [But see Jarman on Wills, note (*c*), vol. i. p. 781.]

(*q*) [*Purefoy v. Rogers*, 2 Lev. 39; *Reeve v. Long*, Carth. 310; *Goodright v. Cornish*, 4 Mod. 258.]

default of paying a sum, or such a one's dying without issue living the other, or such like (*r*). Devise upon Conditions.

A man devised his lands to one, and devised also that the said devisee should pay a rent to A., and that A. might distrain for it; and if the devisee fail of the payment of the rent, that the heirs of the devisor might enter. This is a good distress, and a good condition (*s*).

Devise to his wife; proviso, and my will is that she shall keep my house in good repair; this is a good condition. So a devise of lands to one, paying 10*l.* to another, is a good condition (*t*).

Devise of 100*l.* to his wife, for and in discharge of her dower, is a condition that she shall not have the 100*l.* till she make a discharge of her dower (*u*).

If a man deviseth land to an executor to be sold, this amounts to a condition (*x*).

The mortgagee by will remits part of the mortgage money and all the interest, *if the rest be paid* within three years. If the mortgagor doth not pay within three years, he loses the benefit of the bequest (*y*).

If lands are devised in fee, upon condition that the devisee shall not alien, this condition is void; and so it is of a feoffment, grant, release, confirmation, or any other conveyance whereby a fee simple doth pass. For it is absurd and repugnant to reason, that he who hath no possibility to have the land revert to him, should restrain his feoffee in fee simple of all his power to alien. And so it is if a man be possessed of a lease for years, or of a horse, or of any other chattel real or personal, and give or sell his whole interest or property therein upon condition that the donee or vendee shall not alien the same, this is void; because his whole interest and property is out of him, so as he hath no possibility of a reverter; and if such condition should be good, it would oust him of all the power which the law gives him, which would be against reason, and therefore such a condition is void (*z*).

When the devise is to an infant, when he shall be born, or to a daughter when she shall be married, it shall descend to the heir in the mean time (*a*).

The testator, having the reversion of lands of which another was tenant for life, devised the lands to a man when he should marry his daughter. The tenant for life dies. The lands shall descend until the devisee shall marry the daughter (*b*).

If executors or others who are put in trust by devise to sell, or the like, will not perform the trust, the heir may enter (*c*).

A devise of lands was made to the eldest daughter, paying

(*r*) Vaugh. 259, 270.

(*s*) 1 Lev. 269.

(*t*) 1 Lev. 174.

(*u*) Cro. Eliz. 274.

(*x*) 1 Inst. 236.

(*y*) 1 Cha. Ca. 51.

(*z*) 1 Inst. 223.

(*a*) 1 Sid. 153.

(*b*) 1 Keb. 802.

(*c*) Br. Devise, 46.

Devise upon
Conditions.

100*l.* to the second daughter, and 100*l.* to the third daughter; and if the eldest daughter did not pay the 100*l.* to the second daughter by such a day, then the testator devised the land to the second daughter, she paying her sister's portion by a certain day; and if she did not pay, then he devised the land to the third daughter. It was resolved, this was not in the nature of a mortgage to be redeemable after the time of payment was over; but that the eldest daughter not paying at the time appointed, the second daughter should have the land, and the eldest had no relief (*d*).

The testator devised lands to one, upon condition to pay 30,000*l.* to his grand-daughter and heir at law, to wit, 1000*l.* a year for the first sixteen years, and 2000*l.* a year after till the whole should be paid. Of which, 1000*l.* being in arrear, the heir enters. It was resolved by Cowper, Lord Chancellor, that the devisee of the lands should be relieved upon paying the 1000*l.* with interest, the court declaring that they would relieve wherever they could give satisfaction or compensation for the breach of the condition (*e*).

Where the devisee who is to perform the condition is heir at law, *notice* of a condition must be given to him, because he having a title by descent need not take notice of any will, unless it be signified to him; but where the devisee is a stranger, and not heir, he must inform himself of the estate devised to him, and upon what terms, and must take notice of the condition at his peril (*f*).

Devise tend-
ing to Perpe-
tuity.

Devises, as well as other settlements, which tend to introduce perpetuity, are void; for wills, though favourably expounded, are yet to be construed according to the common rules of the courts at law and equity; hence it is, that a devise to John and his heirs, the remainder to Thomas and his heirs, is void; for that the law in no case will allow a limitation of a fee simple upon a fee simple; because by a devise to John and his heirs, the deviser hath transferred the whole estate to him, and then the limitation over must be impertinent and void, when the deviser before had given the whole estate. Nor can his devise be good by way of future interest, or a remainder to vest upon a contingency; because no man can say when the heirs of John will fail: and to allow the remainder to Thomas to be good upon such a distant contingency, is to perpetuate the estate in the family of John, to preserve a remainder or interest in Thomas, which probably may never vest (*g*).

But though the law will not allow a present remainder to be limited upon a fee, yet a future contingent estate may be limited upon a fee, where the contingency upon which it is to vest is

(*d*) 2 Freem. 206.

(*e*) 1 Salk. 156; 2 Vern. 594.

(*f*) Cart. 94; 1 Ventr. 200. [See further, on this subject, Mr. Jarman's chapters on Executory Devises and Bequests, and on Conditions, in his

treatise on Wills; and the recent cases of *Hawkes v. Baldwin*, 9 Sim. 355; *Wilson v. Mount*, 4 Jur. 262; *Lennox v. Lennox*, *ibid.* 5.—Ed.]

(*g*) Gilb. 116; 2 Bac. Abr. 80.

to happen in a short time: and therefore, if a devise be made to John and his heirs, and if he die without issue, living Thomas, then to Thomas and his heirs, there nothing vests immediately in Thomas, because the whole estate is transferred to John; yet the limitation is good by way of executory interest or devise, because it is to vest on a contingency which is to happen on a life in being, therefore out of the inconvenience or danger of a perpetuity; because John is only tied up from alienating but for life, and his heirs are at liberty to dispose of it after the death of Thomas (h).

Devise tending to Perpetuity.

The utmost length that has hitherto been allowed for the contingency of an executory devise to happen in, is that of a life or lives in being, and one and twenty years afterwards. As when lands are devised to such unborn son of a feme covert as shall first attain the age of twenty-one, and his heirs, the utmost length of time that can happen before the estate can vest, is the life of the mother and the subsequent infancy of her son; and this hath been decreed to be a good executory devise (i).

[In the case of *Cadell v. Palmer* (j), Mr. Baron Bayley delivered the unanimous opinion of the judges in the House of Lords, that the true limit of the rule against perpetuities was "*a life or lives in being, and twenty-one years without reference to the infancy of any person whatever.*"—ED.]

True Limits of the Rule against Perpetuities.

Thelluson v. Woodford (k). Testator devised his real estates, of the annual value of near 5000*l.*, and other estates, directed to be purchased with the residue of his personal estate, amounting to above 600,000*l.*, to trustees and their heirs, &c., upon trust during the lives of the testator's sons, A., B., and C., and of his grandson, D., and of such other sons as A. now has or may have; and of such issue as D. may have; and of such issue as any other sons of A. may have; and of such sons as B. and C. may have; and of such issue as such sons may have as should be living at his decease, or born in due time afterwards; and during the life of the survivor to receive the rents and profits, and from time to time to invest the same in other purchases of real estates; and after the death of the survivor of the said several persons, that the said estates shall be divided into three lots; and that one lot shall be conveyed to the eldest male lineal descendant then living of A. in tail male; remainder to the second, &c., and all and every other male lineal descendant or descendants then living, who shall be incapable of taking as heir in tail male of any of the persons to whom a prior estate is limited, of A. successively in tail male; remainder in equal moieties to the eldest and every other male lineal descendant or descendants then living of B.

(h) Gilb. 116.

(k) 4 Ves. 227; 11 Ves. 112. [See

(i) 2 Blackst. 174; *Vide supra*, "Of what Things."

below, the use of them may be devised over.—ED.]

(j) [7 Bligh, N. S. 202.]

and C. as tenants in common in tail male, in the same manner, with cross remainders ; or if but one such male lineal descendant to him in tail male, remainder to trustees, their heirs, &c. The other two lots were directed to be conveyed to the male descendants of B. and C. respectively, in the same manner and with similar limitations to the male descendants of their brothers, and to the trustees in fee ; and it was directed that the trustees should stand seised upon the failure of male lineal descendants of A., B., and C., as aforesaid, upon trust to sell and pay the produce to his majesty, his heirs, and successors, to the use of the sinking-fund. The accumulation, till the purchases or sales can take place ; to go to the same purposes. The trusts of the will were established, and the decree was affirmed by the House of Lords upon appeal.

[This devise gave rise to the 39 & 40 Geo. 3, c. 98, by which the power of settling and devising property for the purpose of accumulation is restrained, in general, *to twenty-one years after the death of the testator* ; and that the rents and profits during the time that the property is directed to be accumulated contrary to this act, shall go to such person as would have been entitled thereto, if no such accumulation had been directed. This act does not extend to any provision for the payment of debts, or for raising portions for children, or to any direction touching the produce of woods or timber (*k*). A direction for accumulation during a life has been held good for twenty-one years after the death of the testator. Where a trust is created by will for an accumulation which goes farther than 39 & 40 Geo. 3 allows, it is void only so far as the excess. Where it is directed by the will to be made until the legatee's attainment of the age of twenty-one, and the legatee is not then born, it is good for twenty-one years (*l*).—ED.]

Personal
Chattels.

If a man devise a *personal* chattel to one, the remainder of it to another, the first devisee hath the whole property, and may dispose of it as he pleaseth ; for such chattels will bear no limitation over, because, being commonly moveable things, they are subject to be broken, worn out, or lost, in the compass of a life ; and therefore it were ridiculous to suffer a limitation which the nature of the thing will not bear (*m*).

Real Chattels.

But otherwise it is of a *real* chattel, as of an use ; it was indeed formerly held, that such limitations of remainders of terms are void ; but at length the Court of Chancery interposed to rectify the rigour of the common law, and hath settled such remainders of terms to be good where the settlement doth not tend to introduce perpetuity (*n*).

Therefore, if a term be devised to John and the heirs male of his body, provided, if John dies without issue in the life of Thomas, then the term to go to another ; this last limitation is

(*k*) [Griffiths v. Vere, 9 Ves. 127.]

(*m*) Gilb. 117.

(*l*) [Longdon v. Simpson, 12 Ves. 295.]

(*n*) Gilb. 118.

good, because there is no danger of a perpetuity, for the contingency on which it is to vest is to happen within a life in being (*o*).

But if the limitation had been to John in tail, and the remainder over to another; here the last limitation had been void, because the whole property of the term being in John, the limitation over, which is to vest on the contingency of John's dying without issue, is too distant to expect; whereas in the former case, the limitation after the intail to John is good by way of future interest or executory devise, because it is to vest in the compass of a life, or not at all; and it doth not look like a perpetuity to oblige John from alienating, because the estate will be free from the clog when the life is spent, and whoever is proprietor of it afterwards may dispose of it at pleasure (*p*).

Fereyes v. Robertson, E., 1731 (*q*). A man by his will deviseth his leasehold estate, and other his chattels real, to his son William, and to the issue of his body; and if he die without issue, to his son B. and the issue of his body; and if he die without issue, to C., and so on. By the whole court: The whole interest vests in William, and shall go to his executors or administrators, and the limitations over are void.

But a lease assigned in trust for A. for life, remainder to B. for life, with remainder to twenty other persons, all in being at the time, is good; because they are like candles all lighted at a time, and have an easy common probability of determination (*r*).

So to A. for life, remainder to his first issue for life, is good; because no vast uncertain distance of time (*s*).

In general, it seemeth to be agreed, that where the devisee or grantee of a leasehold would be tenant in tail in case of a freehold, he shall have the whole interest in the leasehold, and all limitations over are void; but where he would be only tenant for life in case of a freehold, the limitation of the leasehold over will be good.

Money cannot be devised from one to another; as, for instance, the testator had three daughters to whom he devised 540*l.* equally to be divided; and if any of them died without issue, her part to go the survivor; one of them married and died without issue; the husband exhibited a bill against the executor and the surviving sisters for his wife's part, being 180*l.*, and had a decree; because a sum of money cannot be intailed (*t*). Money.

So in the case of *Butterfield v. Butterfield*, Oct. 29, 1748 (*u*), where money was devised to one for life and the heirs of his body, and if he died without heirs of his body, then to go over; it was held, that the whole property vested in the first taker, the limitation being too remote. And it was said to be an established rule, that where personal estate is given for life, and then to the indefinite heirs of the body, there being no

(*o*) Gilb. 118.

(*r*) Law of Test. 99.

(*t*) 2 Ventr. 349.

(*p*) Gilb. 119.

(*s*) Ibid.

(*u*) 1 Ves. 133.

(*q*) Bunb. 301.

recovery by which the intail of personal estate can be barred, the first taker may dispose of it as he pleases; and though a personal cannot descend as a real estate, yet if it was intended to go in that course of descent, which would be an intail of land, the first taker has the absolute property, and the remainder over cannot take effect.

Devise of the
Use of Chat-
tels personal.

But the *use* of chattels personal may be bequeathed to one for life; and after, the *property* to another: so that if one will that A. shall enjoy the use of his household stuff during his life, and after that it shall remain to B.; this is a good devise thereof to B. But if the *property* of the thing be bequeathed to the first of them, then it is otherwise; for the gift of a chattel personal, though but for an hour, is a gift thereof for ever, provided that the testator make it absolute, and not conditional (*x*).

A devise of goods to A. for life, with remainder after the decease of A. to B. It was said to be now clearly settled, that it is a good devise to B., and that B. may exhibit a bill against A. to compel him to give security that the goods shall be forthcoming at his decease; and is all one whether the goods or *use* of the goods be devised for life (*y*).

Hyde v. Parrot, M., 1696(*z*). The testator bequeathed all his household goods to his wife for life, and after to his son; it is a good devise over, and the same as if the devise had been only of the use of them for her life. And by Lord Somers: It is a rule, where personal chattels are devised for a limited time, it shall be intended the use of them only, and not the thing itself.

Hale v. Burrodale, M., 1702(*a*). A farmer devised his stock, which consisted of corn, hay, cattle, and the like, to his wife for life, and after her death, to the plaintiff. It was objected, that no remainder can be limited over of such chattels as these, because the use of them is to spend and consume them. But the Master of the Rolls said, the devise over was good; but said, if any of the cattle were worn out in using, the defendant was not to be answerable for them; and if any were sold as useless, the defendant was only to answer the value of them at the time of sale. And an account was decreed to be taken accordingly.

Upwell v. Halsey, T., 1720(*b*). The testator, being possessed of a personal estate of the value of 333*l.* having a wife and sister, but no issue, devised that such part of his estate as his wife should leave of her subsistence should return to his sister and the heirs of her body, and made his wife executrix. The wife married, and died, living her husband. The Master of the Rolls said, that it is now established, that personal things or money may be devised for life, and the remainder over, and that though it be true that the wife had a power over the principal sum provided it had been necessary, yet not otherwise.

(*x*) Swin. a. 207; 1 P. Wms. 651.

(*y*) 2 Freem. 206.

(*z*) 2 Vern. 331.

(*a*) 1 Abr. Cas. Eq. 361.

(*b*) 1 P. Wms. 651; S. P. *Hyde v. Parratt*, *ibid.* 1.

And he directed, that the master should inquire how much had been applied for the wife's subsistence, and the husband to account for the residue.

Devise of the Use of Chattels personal.

Where a man devises goods to go as heir-looms with such an estate, so far as by law they may, the court, to the end that the testator's intention may take effect, will decree a conveyance from him to whom they may come as personalty (c).

Chattels, directed to go as heir-looms with an estate, vest absolutely in the first tenant in tail who comes into *esse*, and go to his representative (d).

A devise to one's children and grandchildren generally, refers only to such children and grandchildren as were living at the time of making the will; but if a devise were to one's children and grandchildren living at the time of the death of the testator, a child in *ventre sa mere* might, in such a case, be so far regarded as to be looked upon as living (e).

Devise to Children yet unborn.

For a devise to an infant in *ventre sa mere* is good, and the freehold shall descend in the mean time (f).

So if a man devises lands to be sold for the increase of children's portions, a child born since the will shall have a share (g).

Devise to trustees to permit T. C. to receive the rents for his life, and after his death to sell the estate and divide the money amongst all and every the child and children of T. C. at the age of twenty-one. Sir L. Kenyon, M.R., decreed, that a child born after the death of testatrix shall take (h).

So where a man conveyed a term for 500 years, upon trust to raise 1500*l.* for such child or children as he should have living at his death; and died, leaving no child, but the wife *enceinte* of a daughter, which was after born; it was decreed, that this daughter was a child living at his death, within the meaning of the trust. And the direction of a trust is not so strictly construed as the limitation of an estate at law; and in *Lutterell's case*, in Lord Bridgman's time, a bill was brought on behalf of an infant in *ventre sa mere* to stay waste, and an injunction was granted (i).

And by the 10 & 11 Will.3, c. 16, "Where any estate shall, by any marriage or other settlement, be limited in remainder to, or to the use of the first or other son or sons of the body of any person lawfully begotten, with remainder over to the use of any other person; or in remainder to, or to the use of a daughter lawfully begotten, with remainder over to any other person; any son or daughter of such person lawfully begotten that shall be born after the decease of his father, may, by virtue of such settlement, take such estate so limited, in the same manner as

(c) Bernard. Cha. Ca. 54.

342.

(d) *Foley v. Burnell*, 1 Bro. 274; *Vaughan v. Burslem*, 3 Bro. 101; [See also *Martin v. Long*, 2 Vern. 156; *Johnson v. Castle*, Winch. 116; S. C. Vin. Ab. 104, pl. 2.]

(f) 1 Rolle's Abr. 609; 1 Lev. 135.

(g) 2 Cha. Rep. 211.

(h) *Congreve v. Congreve*, 1 Bro. 530.

(e) *Northey v. Strange*, 1 P. Wms.

(i) *Hale v. Hale*, Prec. Ch. 50.

if born in the lifetime of their father; although there shall happen no estate to be limited to trustees, after the decease of the father, to preserve the contingent remainder to such after-born children until they shall come *in esse*."

In *Reeve v. Long* (k), the objection that there were no trustees to preserve contingent remainders, and that therefore the freehold must be in abeyance, prevailed in the opinion of all the judges. The House of Peers, perhaps influenced by the hardship of the case, reversed the judgment of the courts below, and soon after procured this statute to be passed to settle the point (l).

Jones v. Fulham, T., 11 Geo. 2 (m). The testator, being possessed of a term, devised it in these words: "To my wife for her life, and after her decease, to such child as my said wife is now supposed to be with child and *enceinte* of, and his heirs for ever; provided always, that if such child, as shall happen to be born aforesaid, shall die before it has attained the age of twenty-one years, leaving no issue of its body, then the reversion of one-third part to my said wife, and the other two-thirds to my sisters." The testator dying within a month after, the wife entered, and enjoyed during her life, but had no child or miscarriage. And upon her death the question was, Whether, as no child had ever been born, the remainders, limited upon his dying under twenty-one without issue, could take effect? And, after several arguments, it was held by the Court of King's Bench that they might; that though formerly there had been opinions to the contrary, yet according to the law now settled, the devise to the infant in *ventre sa mere* was well limited, and if any child had been born, would have passed the term accordingly; secondly, that though no child was ever born, yet the remainders are notwithstanding good; for there being no devisee, the devise, though void only *ex post facto*, falls to the ground as much as if it had been void in its creation, and this lets in the remainders immediately; that though the clause by which the remainders are limited is in words, strictly speaking, conditional, yet they do not make it a condition, but only a limitation. Lastly, that the contingencies must happen within a reasonable time; and therefore it may well operate by way of executory devise. And they said they had seen the decretal order in the Court of Chancery, by which it appeared, that the same question, arising upon this same will and concerning the same premises, came before Lord Harcourt, and that he was of opinion, that the devise over of the reversion in thirds to the wife and two sisters was good, notwithstanding the wife was not *enceinte* with any child.

(k) Salk. 228; 3 Lev. 408.

(m) Vin. Devise, L. 53. [See Mr.

(l) See Lord Kenyon's opinion in *Jarman's chapter on the Restraints on the Testamentary Power in his book on Wills, vol. i. p. 221.—Ed.]*

Lancashire v. Lancashire, 5 T. Rep. 60; see also 1 T. Rep. 634; Har. Co. Lit. 291, n.; Bul. N. P. 105.

The father settled a lease, with reference to his will, in which he gave 500*l.* to each of his daughters, to be paid at the age of twenty-one; and if any or all died before that age, then to others; but devised no maintenance to them till their portions became payable. By the court: A maintenance cannot be decreed, because of the devise over (*n*).

In what case Maintenance shall be implied.

But if there is no devise over, the court will decree a maintenance in the mean time. Thus in the case of *Harvey v. Harvey*, E., 1722(*o*). The father, seised of a real estate and possessed of a personal estate, and having several children, deviseth all his real and personal estate to his eldest son, charging the same with 1000*l.* a piece to all his younger children, payable at their respective ages of twenty-one; but in the will no notice is taken of maintenance for the younger children in the mean time. The younger children bring their bill in order to recover interest, or some maintenance during their infancy. Upon which, the Master of the Rolls, having taken time to consider of the case, and having been also attended with precedents, decreed, that the younger children should recover maintenance. He observed, that these being vested legacies, and no devise over, it would be extremely hard that the children should starve when entitled to so considerable legacies, for the sake of their executors or administrators, who, in case of their deaths, would have the said legacies. That in this case, the court would do, what in common presumption the father, if living, would (nay, ought to) have done, which was, to provide necessaries for his children.

[The general rule is, that where a bequest is *vested* and *immediate*, so that the legatee, if he were of age, would be entitled to receive his legacy at the end of the year from the testator's death, the Court of Chancery will order *maintenance* out of the *interest* of the legacy, although no express provision be made for maintenance, and, provided the parents of the infant legatee are unable to maintain him, even though the interest be expressly directed to accumulate (*p*).—ED.]

8. Household Goods, &c.

It is usual in wills to devise all the household stuff, by which words, plate about the house, and not for ornament, passeth; but books, cattle, clothes, coaches, corn, carts, ploughs, waggons, and any thing fixed to the freehold, will not pass by that word (*q*).

Household Stuff.

By a devise of household goods, plate will pass (*r*).

[A clock in the house, if not fixed thereto, will pass (*s*), but

Household Goods and Furniture.

(*n*) 1 Chan. Cas. 249; 3 Salk. 127. see V. Williams on Ex. & Ad., vol. ii.

(*o*) 2 P. Will. 22.

1115—1118; and the recent case of *Hadow v. Hadow*, 9 Sim. 438.]

(*p*) [*Greenwell v. Greenwell*, 5 Ves. 194; *Collis v. Blackburn*, 9 Ves.

(*q*) Swin. a. 185.

470; *Stretch v. Watkins*, 1 Madd. 253;

(*r*) 2 Vern. 628; 3 Atk. 370.

Ex parte Bond, 2 M. & N. 439; but

(*s*) [*Stanning v. Style*, 3 P. Wms.

see *Reeves v. Beymer*, 6 Ves. 425; 334.]

not articles of consumption (*t*); nor will guns and pistols used in shooting game or in riding (*u*).—ED.]

Nichols v. Osborn, T., 1727 (*x*). The testatrix devised all her household goods to J. S. The question was, Whether, by the devise of the household goods, the plate should pass? Though it was reported, on a reference to a master, that there were manifest intentions and declarations of the testatrix that she did not intend the plate should pass, yet the master certifying that the plate was commonly used in the house, all the evidence touching the intention of the party was rejected, there being a complete and plain will in writing, which must not be altered or influenced by parol proof.

If a man deviseth 1200*l.* to J. S., and by general words deviseth all his goods, chattels and household goods in and about his house to the said J. S.; money in the house will not pass, he having a particular legacy devised to him (*y*).

By a devise of jewels, plate, pictures, medals, and furniture, it was decreed by Lord Hardwicke, that *a library of books* did not pass under the word furniture (*z*).

Under a bequest of *household furniture*, plate in the house at the testator's death, whether in common use or not, if suitable to the rank of the testator, pictures hung up, linen, and china, will pass, but books in a library will not (*a*). Neither will jewels *occasionally worn* pass by the bequest of "a cabinet of curiosities," although usually shown with it (*b*).

[Generally, by the expression "*household furniture*," all personal chattels will pass that may contribute to the use or convenience of the householder or ornament of the house (*c*).—ED.]

All his Goods,
what it im-
plies.

It is usual likewise to devise all the goods moveable and immoveable. Now, by the civil law, actions and rights of actions pass by the word moveables, especially when the words of universality are repeated in the will, as, "I give to T. S. all my moveable goods and immoveable, of what kind soever, or wheresoever found (*d*)."

[Rights of entry pass under 1 Vict. c. 26, see below.—ED.]

One deviseth all his goods; and, Whether a debt by bond passed to the devisee? was the question: decreed by Lord Chancellor Cowper, that it did; that these words seemed at common law to pass a bond, and to extend to all the personal

(*t*) [*Stanning v. Style*, 3 P. Wms. 334.]

(*u*) [*Ibid.*]

(*x*) 2 P. Wms. 419.

(*y*) Swin. a. 185.

(*z*) 3 Atk. 202.

(*a*) *Sir G. Kelly v. Powlett*, Amb. 605, [approved of by Lord Alvanley in *Porter v. Tournay*, 3 Ves. 313.]

(*b*) *Cavendish v. Cavendish*, 1 Bro. 467.

(*c*) [*Kelly v. Powlett*, Amb. 605;

see also *Cremorne v. Antrobus*, as to pictures and coins, by Ld. Lyndhurst, 5 Russ. 312; *Birch v. Dawson*, 2 Ad. & Ell. 37, as to fixed furniture; and *Cole v. Fitzgerald*, 1 Sim. & Stu. 189, where a *parrot* was held to pass, but not a *pony* or *cow*, under "household furniture and other household effects," confirmed by Lord Lyndhurst, 3 Russ. Chanc. C. 301; *Fitzgerald v. Field*, 1 Russ. Chanc. C. 427.—ED.]

(*d*) Swin. a. 185.

estate; but this being in the case of a will, and a will relating to a personal estate too, it ought to be construed according to the rules of the civil law; now the civil law makes *bona mobilia* and *bona immobilia* the *membra dividenda* of all estates, *bona immobilia* are land, *bona mobilia* are all moveables, which must extend to bonds, and therefore by the devise of all the testator's goods, a bond must pass (e).

All his Goods,
what it im-
plies.

But where the testator gave to "R. M., all his goods and chattels in Suffolk," and died, having goods and chattels there, and also in other counties, Lord Thurlow, C., held, that a bond found in Suffolk did not pass, because though accounted *inter bona notabilia* of the diocese where it is found (f), being a *chose in action* it has not the *locality* which can attach it to a particular place (g). See also *Chapman v. Hart* (h), where Lord Hardwicke says, that such a devise relates to the death of the testator, and the goods, if removed before, (except contingently, as for fear of fire, or by the owner being ordered from ship to ship), do not pass (i).

By a devise of all his goods, a lease for years will pass, if there be not some other circumstance to guide the intent of the devisor (k).

But where a man devised to his niece *all his goods, chattels, household stuff, furniture, and other things which then were, or should be in his house at the time of his death*, and died, leaving about 265*l.* in ready money in the house, it was decreed, that this ready money did not pass; for by the words *other things* shall be intended things of like nature and species with those before mentioned (l).

So where a man devised so much of his *personal estate as should be and remain on such an estate at his death*; and there were, amongst other things, corn, household goods, plate, and 400*l.* in money, it was decreed, by the Lord Chancellor Hardwicke, that all stock on the farm, live and dead, and all stores on the lands, did pass, but that the 400*l.* did not pass by the devise (m).

But ready money in a house (including bank notes), if not an extraordinary sum, will pass by a devise of all things in the house (n).

So where a man devised to his wife *all his household goods and other goods, plate and stock within doors and without*, and bequeathed the *residue* of his personal estate to another, it was decreed, that the testator's ready money and bonds did not pass by the word *goods*; for if the words were to be taken in so large a sense, it would make void the bequest of the *resi-*

(e) 1 P. Wms. 267.

(f) 1 Rolle's Abr. 909.

(g) *Moore v. Moore*, 1 Bro. 127.

(h) 1 Ves. 271.

(i) See also *Green v. Symonds*, 1 Bro. 129.

(k) Swin. a. 200.

(l) *Trufford v. Berridge*, M., 1729,

1 Abr. Eq. Cas. 201.

(m) *Inclendon v. Northcote*, March 2nd, 1746; 3 Atk. 437.

(n) Prec. in Cha. 8; *Chapman v. Hart*, 1 Ves. 271.

duum, and therefore the words *other goods* should be understood to signify things of the like nature with *household goods*, that the whole will might have its effect(n). [And Lord Alvanley held, that running horses passed under a bequest of this description, *i. e.* “*in and about his dwellinghouse and out-houses (o)*” A bequest “of all my goods, chattels, estate and estates whatsoever,” will pass realty as well as personalty(p).—ED.]

Chattels.

Chattels are of two kinds, real and personal. Real chattels are such as concern or savour of the realty; as terms for years of land, the next presentation to a church, and the like. Chattels personal (which are what are commonly to be understood when goods and chattels are given by will) are properly things moveable, which may be annexed to or attendant on the *person* of the owner, and carried about with him from one part of the world to another. Such are animals, household stuff, money, jewels, corn, garments, and every thing else that can properly be put in motion, and transferred from place to place(q).

By a devise of all his chattels, the devisee shall not have glass of the windows, wainscot, tables dormant, fats in the brewhouse fixed to the freehold, nor furnaces, nor the box or chest where the testator's evidences are; nor doves in the dove house, nor fishes in the pond, nor deer in the park: for these things belong all to the heir(r).

9. Lands.

Lands, implies the Corn growing thereon.

[A bequest of all the testator's “chattels” will have the same effect as a bequest of all his “goods and chattels(s).—ED.]

If a man seised of land for life, or in fee, or in tail, in his wife's right or his own, sows it with corn or any manner of grain, and dies before severance, it shall go to the executor of the husband, and not to the wife or heir that shall have the land(t).

But where a man was seised of land in fee, and sowed the land, and *devised* the same, and died before severance, it was adjudged, that in this case the devisee should have the corn, and not the executors of the deviser; for the devisee, in relation to the chattels belonging to the land, is put in the place of the executors, by the words of the will(u).

So if a man seised in fee sows copyhold lands, and surrenders them to the use of his wife, and dies before the severance, it seems that the wife shall have the corn, and not the executors of the husband: for this is a disposition of the corn, it

(n) [2 P. Wms. 112.]

(o) [Gower v. Gower, Amb. 61.]

(p) [Hunter v. Pugh, 4 Jur. 371.]

(q) 2 Black. b. 2, c. 24.

(r) Curs. 181.

(s) [Co. Lit. 118 b; Swinb. Pt. 7,

s. 10, pl. 8; Kendall v. Kendall, 4

Russ. 3 Ch. C. 370.]

(t) Went. 59; Swin. 214; 2 Inst.

18; Hob. 132.

(u) Spencer's case, M., 20 Jac. 1;

Winch, 51; Swin. a, 183.

being appurtenant to the land: and since the husband hath disposed of it during his life, it cannot go to his executors (x). Lands, implies the Corn growing thereon.

And the reason why the corn passeth to the donee as appertaining to the soil when the property of the soil alters, and yet shall not descend to the heir, as appertaining to the soil when the property of the soil remains in the first owner, is this: because every man's donation shall be taken most strongly against himself; and therefore it shall pass not only the land itself, but the chattels that belong to the land. But no chattels can *descend* to the heir, and therefore they go to the executor (y).

So if land be *sold*, the corn growing shall go to the purchaser of the land, unless specially excepted (z).

A person seised in fee sows the land, and after grants it to A. for life, remainder to B.; A. enters, and dies before the corn is severed. His executors or administrators shall not have the crop, because he was not at any charge or industry, but B. shall have it (a).

Generally, the distinction seemeth to be, where the estate is determined by the act of the party himself, and where it is determined by the act of another.

And therefore Littleton saith, if the lessee, being *tenant at will*, sow the land, and the lessor, after it is sown, and before the corn is ripe, put him out; yet the lessee shall have the corn, and shall have free entry, egress and regress, to cut and carry away the corn, because he knew not at what time the lessor would enter upon him. Otherwise it is, if *tenant for years*, who knoweth the end of his term, sows the land, and his term ends before the corn is ripe; in this case, the lessor or he in the reversion, shall have the corn, because the lessee knew the certainty of his term and when it would end (b).

And the reason why the tenant at will shall have the corn is, because his estate is uncertain; and therefore lest the ground should be unmanured, which would be hurtful to the public, he shall reap the crop which he sowed in peace, albeit the lessor doth determine his will before it be ripe. And so it is, if he set roots, or sow hemp, or flax, or any other annual profit; if after the same be planted, the lessor oust the lessee, or if the lessee dieth, yet he or his executors shall have that year's crop. But if he plant young fruit trees, or young oaks, ashes, elms, or the like, or sow the ground with acorns; there the lessor may put him out notwithstanding, because they will yield no present annual profit. And this is not only proper to a lessee at will, that when the lessor determines his will, the lessee shall have the corn sown, but to every particular tenant that hath an estate uncertain. And therefore if tenant *for life* soweth the ground, and dieth, his executors shall have the corn: for that his estate was uncertain, and

(x) 1 Rolle's Abr. 727.

(y) Gilbert's Law of Evid. 250.

(z) Went. 59.

(a) Hob. 132.

(b) Litt. sect. 68.

Lands, im-
plies the
Corn growing
thereon.

determined by the act of God. And the same law is of the *lessee for years of tenant for life*. So if a man be seised of land *in the right of his wife*, and soweth the ground, and he dieth, his executors shall have the corn; and if his wife die before him, he shall have the corn. But if husband and wife be joint-tenants of the land, and the husband soweth the ground, and the land surviveth to the wife, it is said that she shall have the corn. So if a woman seised in fee or for life sows the land, and then takes a husband, and he dies before the severance, the wife shall have the profits, and not the executors of the husband: for the corn committed to the ground is a chattel real, which is annexed and belonging to the freehold; and not a chattel personal, annexed to the freehold and transferred. And therefore if the husband doth not dispose of it during his life, it belongs to the wife and not to the husband. So if the husband sows the land, and dies before severance, the wife shall have the third part of the land so sown for her *dower*: for she shall be in the best possession of her husband, above the title of the executor; and it would be unreasonable, if her husband had all corn land, that she should stay for her subsistence for a whole year, till the crop should be renewed. If a man seised of lands in fee hath issue a daughter and dieth, his wife being *enceinte* with a son; the daughter soweth the ground; the son is born; yet the daughter shall have the corn, because her estate was lawful, and defeated by the act of God; and it is good for the commonwealth that the ground be sown. But if the *lessee at will* sow the ground with corn, and after he himself determine his will, and refuseth to occupy the ground, in that case the lessor shall have the corn, because he loseth his rent. And if a woman that holdeth land *during her widowhood*, soweth the ground, and taketh husband, the lessor shall have the corn, because the determination of her own estate grew by her own act. But where the estate of the lessee, being uncertain, is defeasible by a title paramount; or if the lease determine by the act of the lessee, as by forfeiture, condition, or the like; there, he that hath the right paramount, or that entereth for any forfeiture or the like, shall have the corn. So if a *disseisor* sow the ground, and sever the corn, and he who is disseised re-enter, he shall have the corn, because he entereth by a former title; and severance or removing of the corn altereth not the case: for the regress is a recontinuance of the freehold in him in judgment of law from the beginning (c).

10. Restraints of Testamentary Powers—Marriage, &c.

Devise in re-
straint of
Marriage (d).

Generally, by the ecclesiastical law, all conditions against the liberty of marriage are unlawful, as being a restraint on

(c) 1 Inst. 55; 2 Inst. 81; 1 Rolle's Abr. 727.

(d) [See Jarman on Wills, chapter on Conditions, vol. i. p. 796.—Ed.]

the natural liberty of mankind, and an hindrance to the propagation of the species.

Devise in
restraint of
Marriage.

So if the condition be, that the legatee marry according to the appointment, arbitrament, or consent of some other person, this is rejected as unlawful (e).

But if the conditions are only such as whereby marriage is not absolutely prohibited, but only in part restrained, as in respect of time, place, or person, then such conditions are not absolutely to be rejected (f).

So if the condition be, not to marry before the age of twenty years, this condition is to be performed; otherwise, if it is continued to an unreasonable length.

So if the condition be, not to marry such a particular person, or a widow, or of one particular place, or the like.

The ecclesiastical law has borrowed this doctrine from the Roman law, in which the *Lex Julia de Maritandis Ordinibus*, introduced by Augustus (g), made all conditions prohibiting marriage void, and conferred rewards and honours on those who had numerous families of children. The necessity of enacting this law we collect from the historians and satirists to have been a singular love of celibacy which pervaded the rich, who were induced to remain unmarried by the respect which was paid them by all who wished to share their inheritance. Petronius observes, "in this city no one educates children." And in A. Gellius, i. 6, we find Metellus Numidius gravely advising his countrymen to marry; because "though they cannot live comfortably with their wives, it is impossible they should live without them entirely, and they should therefore prefer their lasting welfare to a short gratification." So great a corruption of manners required the interference of the legislature. It is agreed that a condition restraining a person who had never been married, from marriage generally, was by this law rendered void, and the legacy vested absolutely; but a legacy to a widow, on condition *that she should remain a widow*, might be claimed by her if she married within a year, swearing that she did so for the sake of procreating children; but after the lapse of the year she was compelled to give security for the performance of the condition. This Justinian altered in his Code, 6, 38, 2 & 3, permitting widows in such cases to marry, *maritorum suorum interminatione spretâ*; though he changed his opinion in the Novels, and required them in all such cases to give the *cautio mutiana*, which bound them to restore the legacy if they broke the condition (h). But though by the law of the Digest and Code, conditions prohibiting marriage in

Ecclesiastical
Law borrows
its Provisions
on this Sub-
ject from the
Roman Law.

(e) Godolphin's Orphan's Leg. 45.

(f) Ibid.

(g) This law was also called *Julia Papia*, *Papia Poppæa*, and, in the Code, *Julia Miscella*; which various names were probably given to dif-

ferent chapters of it. See Cujac. *Paratit. in Cod.* 6, 40, and *Leges Romanæ*, subjoined to Calvin's *Lexicon*.

(h) Nov. 22, c. 43.

Devise in
restraint of
Marriage.

general were set aside thus, "*Si non nupserit,—si in viduitate permanserit,—si nupserit Titio scil. indigno,—si arbitratu Titii nupserit,—Patri si filia quam in potestate habet non nupserit,—filio familias si pater ejus uxorem non duxerit (i);*" and this though the legacy were given over, thus: "*Titio restituat si nubat (k);*" yet the following conditions were allowed, as appears by the same title: "*Filiæ meæ cum nupserit,—si cum Titio nupta erit,—si neque Titio neque Seio neque Mævio nupserit,—si Ariciæ non nupserit,—Titio, si Seiam uxorem duxerit,—uxori, si a liberis impuberibus ne (non) nupserit,—dum cum filio meo erit,—dum cum filio meo Capuæ erit (l).*" And the reason is, that the testator in the latter cases seems to regard the care and education of his children rather than to enjoin perpetual widowhood; and though a condition restrictive of marriage generally was void, yet one deferring it to a certain day, or making it to depend on some contingency, if not in fraud of the law, was allowed (*m*). If these restraints on marriage were thought reasonable in the civil law, they must appear much more so in ours, which does not provide with equal anxiety against improper and unequal marriages; especially as that excessive love of celibacy has not yet been experienced in this country, and it has become the policy of the law to protect the property of young persons till they arrive at an age of discretion which may enable them to take care of it themselves. Nevertheless, in *Long v. Dennis (n)*, Lord Mansfield and the other judges agreed, that conditions in restraint of marriage ought to be construed with the utmost rigour and strictness.

[The law of England holds an injunction to ask consent lawful (*o*); and a condition not to marry or to marry a particular person has been held good; and so one which limits the time to a reasonable age, provided such limitation be not a mask to restrain marriage generally. A condition prescribing due ceremonies and place of marriage is valid, and so is an annuity during widowhood.—ED.]

Perrin v. Lyon (p). In this case the will of the testator contained this proviso: "If my wife or daughter should marry a *Scotchman*, either of them so marrying shall forfeit all benefit and advantage under my will: and the estates given to such my wife or daughter as shall so marry, shall descend to such person or persons as would be entitled under my will, in the same manner as if my wife or daughter were dead." The Court of King's Bench held such partial restraint of marriage to be legal.

(i) Dig. 35, 1, *passim*.

(k) Dig. 1. 22.

(l) Dig. 32, 3, 30, s. 5.

(m) Dig. 35, 1, 72, s. 5, with the Com. of M. Pothier *ad Pand. in Nov. Ord. digestæ*, No. 33.

(n) 4 Burr. 2052.

(o) [Sutton v. Jewks, 2 Ch. Rep.

95; *Ashton v. Ashton*, Pra. Ch. 226;

Dashwood v. Bulkeley, 10 Ves. 230;

Creagh v. Wilson, 2 Vern. 573;

Chauncey v. Graydon, 2 Atk. 616;

Hemmings v. Munckley, 1 B. C. C. 303.—ED.]

(p) 9 East's Rep. 170.

Generally in the temporal courts, the distinction seemeth to have been, where the legacy is devised over to another, and where it is not devised over: in the former case it hath been held, that the restraint shall be good, so as the legacy shall not be due, unless the condition be performed; but in the latter case, where there is no devise over, it hath been held, that the proviso or condition is only *in terrorem*, to make the person careful, but not to defeat the legacy (*q*).

Devise in
restraint of
Marriage.

And note, it has been decided that where there is an alternative gift, as 10*l.* a year at all events to a grand-daughter, but if she marries with the good liking of trustees, 150*l.* in lieu of the annuity, if she marry without such consent, equity will not relieve so as to give the larger portion (*r*). A devise of the residue has also been holden tantamount to a devise over of the specific legacy (*s*). But where the condition of marrying is annexed, it is necessary that the marriage should take place to vest the legacy, although the consent of particular persons should be dispensed with (*t*).

Also in the temporal courts a distinction is made where a portion is charged on the personalty, and where it is charged on land. If it is charged on the personalty, they follow the rule of the ecclesiastical court, which hath jurisdiction as to the personalty; but if it is charged on land, of which the ecclesiastical court hath no jurisdiction, they follow the rule of the common law courts, which on non-performance of the condition will not suffer the portion to be raised (*u*). In the case of *Harvey v. Aston*, April 30, 1737, Sir Thomas Aston by settlement after marriage created a term in trust by mortgage or sale to raise 2000*l.* for each of his daughter's portions, "provided they marry with their mother's consent, and if either die before marriage with such consent, her portion to cease, and the premisses to be discharged; and if raised, then to be paid to the person to whom the premisses should belong:" and afterwards by will created another trust term to augment their fortunes 2000*l.* a piece more, but *subject to the condition as in the settlement*, and gave the residue over and above 2000*l.* a piece to his wife: and by a codicil created another trust term for the better raising of his daughters' portions. Sir Thomas

(*q*) 1 Cha. Ca. 22; 1 Vern. 20; 2 Vern. 293, 357; [Willes, 83; 19 Ves. 14; 3 Atk. 364. The two cases of *Underwood v. Morris*, 2 Atk. 154, and *James v. Suffolk*, 1 B. C. C. 538, would appear to contravene this rule. But see *Hemmings v. Munckley*, 1 B. C. C. 303; S. C. 1 Cox, 39, (Lord Loughborough); *Scott v. Tyler*, 2 B. C. C. 488, mentioned below (Lord Thurlow); and see the remarks of Sir W. Grant in *Lloyd v. Branton*, 3 Mer. 108.—Ed.]

(*r*) *Gillet v. Wray*, 1 P.Wms. 284; [Lord Cowper, *Creagh v. Wilson*, 2 Vern. 573.]

(*s*) *Scott v. Tyler*, 2 Bro. C. C. 431.

(*t*) *Garbut v. Hilton*, 1 Atk. 381; *Atkins v. Riccocks*, *ibid.* 500; [*Hemmings v. Munckley*, 1 Cox, 39.]

(*u*) *Add*, "Or if it be raised, and the condition subsequent be broken, will divest the estate." 1 Roll. Ab. 418, pl. 6; *Fry v. Potter*, 1 Cha. Ca. 138.

Devise in
restraint of
Marriage.

died, leaving issue two daughters. One of them married after the age of twenty-one, and the other before the age of twenty-one, and both of them without the consent of their mother. Sir Joseph Jekyll, Master of the Rolls, decreed the portions to be paid. But on appeal from this decree, the Lord Chancellor Hardwicke, assisted by the two Chief Justices Lee and Willes, and the Chief Baron Comyns, reversed the decree; and argued, first, that it is the right and liberty of the subject, who makes a voluntary disposition of his own property, to dispose of it in what manner, and upon what terms and conditions he pleaseth. Secondly, that it is an established maxim of law, that if an estate in land, or interest out of the land, is limited to commence upon a condition precedent, nothing can vest or take effect till the condition is performed. And this is so strong and so settled a point, that although the previous act was at first impossible by the act of God, or other accident, the estate can never vest. Thirdly, that it is most agreeable to the rules of equity, to direct the execution of the trust according to the intent of him who appointed the trust. It is said that a trust is to be construed favourably: and it is true, it is to be construed with as much advantage as may be to make good and answer the intent and design of the party, but it is to be construed strictly with regard to the execution of the trust; and therefore it would be a strange thing, when the trust directs the trustees to pay the money at the time of the daughter's marriage with her mother's consent, that the court should direct them to pay the money before that time. Fourthly, that a restraint in the present case is not only lawful, but prudent and reasonable; and no consequence more likely to ensue from it, than the hindrance of an inconsiderate or imprudent marriage (x).

Pulling v. Reddy, T., 1743(y). By the Lord Chancellor Hardwicke: "If a legacy be given to a woman upon this condition, that she marry with the consent of a third person, and there be no devise over in case she marry without such consent; this is only to be considered *in terrorem*: but if there be a devise over, then it shall go to whom it is so devised over. *This rule is taken from the civil law, as this court hath a concurrent jurisdiction as to legacies.* But if a portion be to arise out of land, and there is no devise over, in that case she shall not have it, but it shall go to the heir; for the Spiritual Court hath no jurisdiction as to lands." There may be some doubt (he said) where money is given to be laid out in lands.

Reynish v. Martin, May 5, 1746(z). Elizabeth Philips by her will devised her real estate to her daughter Martha and her heirs for ever, and then says, "If my daughter Mary "marry with the consent of the trustees (therein particularly

(x) Comyns, 744; Cas. Talb. 212;
1 Atk. 361.

(y) 1 Wilson, 21.

(z) 3 Atk. 330; 1 Wilson, 130.

“ named), or the major part of them, signified in writing before
“ such marriage had, then and not otherwise I give and de-
“ vise to my said daughter Mary the sum of 800*l*.:” and after
comes a clause—“ And I do hereby charge all my aforesaid
“ real estate with all my debts of all kind, and with all my
“ legacies.” The testatrix died, leaving issue the said two
daughters Martha and Mary. Mary married Thomas Reynish
the plaintiff, without the consent of the trustees: and the bill
was brought by Thomas Reynish, as representative and ad-
ministrator of Mary his wife, for an account of the personal
estate, and that the same might be applied in payment of the
said legacy of 800*l*.; and in case the personal estate should
not be sufficient, that then the real estate, or so much thereof
as will make good the deficiency, might be sold, and the money
arising therefrom applied for that purpose. This case coming
on to be heard at the Rolls, the personal estate not being suffi-
cient, Fortescue, Master of the Rolls, decreed the real estate
to be sold for payment of the legacy. The defendants ap-
pealed from the decree, and the cause now standing for judg-
ment, Lord Hardwicke delivered his opinion to the following
effect: “ First, I will consider this as if it had been a mere
personal legacy, and payable out of the personal estate. Se-
condly, I will consider it as if it had been charged on the real
estate originally. As to the first, I apprehend that taking this
as a mere personal legacy, the plaintiff by the rules of the civil
and ecclesiastical law, and which have been constantly adhered
to in this court, will be entitled to the legacy; for it is an
established rule in the civil law, and has long been the doc-
trine of this court, that where a personal legacy is given to a
child on condition of marrying with consent, this is not looked
on as a condition annexed to the legacy, but as a declaration of
the testator *in terrorem*; and indeed the civil law makes such
conditions void, notwithstanding the legacy be given over; but
that has not been received so in this court. But whenever the
legacy is given over for breach of the condition, the gift over
shall take place upon this foundation, because it thereby ap-
pears clearly, that the person to whom it was given over was
in the mind and contemplation of the testator at the time of
making his will; but in the present case there is no such gift
over. The second consideration is, what the consequence will
be, taking this legacy as a charge originally laid upon the
lands, and not merely personal. In the will it is first of all a
personal legacy, issuing out of personal estate; but then the
testatrix afterwards, at the close of her will, charges all her
real estate with all her debts and legacies. If it had been
originally charged upon the land, and given upon the con-
dition before mentioned, it could not have been contended that
the plaintiff could have recovered it after breach of the con-
dition; and indeed it would be contrary to the rule of the

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common law (to decree for the plaintiff), which always favours the heir, and contrary to the determination in *Harvey v. Ashton*; for the difference taken there is, that this court follows the rule of the civil law, because that was the original jurisdiction for the recovery of personal legacies; but whenever land is in question, or to be affected, this court followeth the rule of the common law; and in all cases whereof this court takes cognizance of suit, where the original jurisdiction arises in another court, the rule of this court is always to follow the law of that other court; for if this court did not pursue that rule, there would be different remedies in different courts, which would create great inconvenience, and the rule of right in different courts would be different. But though this be so in the case of a personal legacy, it is not so in regard to lands affected or charged with legacies, because the property of land must be governed by the law of England; and where it is a legacy charged upon land, it must have the same consideration as a devise of the land itself would have had: and I am of opinion, if this case stood as an original charge upon land, the plaintiff could have no right to demand it. But this being an original personal legacy, the plaintiff is entitled to have an account of the personal estate of the testatrix, but not of her real estate. But as the personal estate may be exhausted by the payment of debts and legacies, the next question will be, whether this court cannot marshal the assets in such a manner as to give the plaintiff a remedy out of the real estate; and as the real estate is expressly charged with the payment of all debts and legacies, and this legacy, by the event which has happened, falls out to be a charge upon the personalty only, I am of opinion that the plaintiff ought to stand in the place of such creditors or legatees as have received a satisfaction out of the personal assets: and to order it so is the constant rule and practice of this court."

In the case of *Needham v. Vernon*, 25 Car. 2 (a), lands were devised in trust for raising portions for daughters, payable upon their marriages with consent of the trustees; but if they married without consent, then to remain over to another. The daughters were old, and never intended to marry, but to lay out their portions in a purchase of annuities for their lives. And it was held that they should have their portions immediately, upon giving security to indemnify against the persons to whom the portions were devised over. And the like hath been decreed upon giving security to refund, if the condition should be broken.

In *Scott v. Tyler* (b), the testator, Richard Kee, directed his trustees to purchase 10,000*l.* South Sea annuities, and willed that one moiety of that stock should be transferred to his good daughter Margaret Christiana Tyler, of whom he was the pu-

(a) 1 Abr. Eq. Cas. 111.

(b) 2 Bro. 431.

tative father, at her age of twenty-one years, if she should then be unmarried, and the other moiety at her age of twenty-five years, if she should then also be unmarried; but in case she should marry before twenty-one *with consent of her mother*, he directed certain settlements to be made, and in case she should die before twenty-five unmarried, he gave the 10,000*l.* to the mother, whom he also made residuary legatee. The daughter, who had other property given her by the will, married under twenty-one against the consent of her mother, who entered into trade and became a bankrupt; and the question was between the daughter and the assignees of the mother. Per Lord Thurlow, C., after full argument: "An injunction to ask consent is lawful, as not restraining marriage generally; a condition that a widow shall not marry is not unlawful. An annuity during widowhood, a condition to marry or not marry Titius is good (c). A condition prescribing due ceremonies and place of marriage is good; still more is a condition good which only limits the time to twenty-one or any other reasonable age, provided it be not used evasively as a cover intending to restrain marriage generally. And it is agreed on all hands, that (however restrictive of marriage) when the legacy is given over to other uses, the testator shall be deemed to regard those uses. I am of opinion that the daughter having married at eighteen, improvidently (as far as appears) and against the anxious consent of the mother, never came under the description to which the gift of the 10,000*l.* South Sea annuities was attached; it is therefore void, and part of the residue, and belongs to the assignees of the mother."

Where Marriage with Consent is restricted to Minority.

[A review of all the cases seems to show that the general inclination of courts has been to confine conditions restraining marriage to marriage during minority, or within the period fixed for the payment of the legacy (d).—ED.]

Result of all the Cases.

11. Legacies—Lapse.

If a legacy be given on condition not to dispute the will, and the legatee commenceth a suit whereby he disputes the validity of the will, yet this is no forfeiture of the legacy if there was probable cause of contesting it (e).

Condition not to give Trouble to the Executor.

And even although there be no probable cause, yet where a legatee or other person interested hath a right to see the will proved in solemn form, his making use of that right cannot (as it seemeth) be deemed a disturbance.

Nutt v. Burrell, E., 1724(f). The testator gives to B. a

(c) *Stone v. Theed*, 2 Bro. 243. —ED.]

(d) [*Knapp v. Hayes*, Amb. 662; (e) 3 Bac. Abr. 479.

King v. Withers, Cas. temp. Talb. (f) Cha. Ca. King, 1.

117; *Osborne v. Brown*, 5 Ves. 527.

legacy, on pain of forfeiture of it in case he should give his wife (whom he made executrix) any trouble in relation to his estate. B. brings a bill against the wife, for which there was very little colour, and amongst other things demands his legacy. The chancellor was of opinion that the suit was very frivolous, but would not declare the legacy forfeited.

But in the case of *Cleaver v. Spurling*, T., 1729 (*g*), a person by his will gives a legacy to his daughter, provided that if she or her husband refuse to give a release, or put the executor to any trouble, the same *shall go over to her sister's children*. The daughter and her husband (being within the custom of the city of London) sue for her orphanage part. Decreed that the legacy was forfeited; for however it might have been construed to be intended only *in terrorem*, yet being devised over, and by that means a right to this legacy being vested in a third person, a court of equity could not divest it or call it back again.

Webb v. Webb, H., 1710 (*h*). The father gave a legacy of 40*l.* to his son, upon condition that he should not disturb the trustees. They applied to the court for an execution of the trust, and that he might either join with them in a sale, or lose the legacy. And it was decreed accordingly by Harcourt, Lord Chancellor. But Mr. Coxe, in his note to this case, observes that such conditions are considered to be merely *in terrorem*, and therefore void, unless the legacy be given over, as in *Cleaver v. Spurling*.

[*Litigation*, in the sense of the condition, means vexatious litigation, when there is not *probabilis causa* (*i*).—ED].

Things devised twice.

It is said by some, that if land be devised to one, and after in the same will to another, they shall take it as joint tenants (*k*).

But by Lord Coke, the last devise taketh place; the same being for so much a countermand of the former part of the will. And of this opinion was Lord Hardwicke in the case of *Ulrich v. Lichfield* (*l*) above mentioned, though (he said) the later opinions have taken it otherwise.

But as to this, it seemeth that no certain rule can be laid down; but the determination will vary according to the particular circumstances in each will (*m*).

[The intention of the testator is the rule of construction (*n*).

[Mr. Toller has the following remarks on this subject (*o*): "Legacies may be also cumulative: they are contradistinguished from such as are merely repeated. As where a testator has twice bequeathed a legacy to the same person, it becomes

(*g*) 2 P. Wms. 528.

(*h*) 1 P. Wms. 136.

(*i*) [See *Ingram v. Strong and others*, 2 Phil. R. 294.]

(*k*) Gilb. 159.

(*l*) 1 Inst. 112; 2 Atk. 372.

(*m*) 2 Atk. 374.

(*n*) [*Ridges v. Morrison*, 1 Bro. C. C. 389; *Coote v. Boyd*, 2 Bro. C. C. 527.]

(*o*) [Toller on Executors, p. 334, sect. v. "On Cumulative Legacies."]

a question whether the legatee be entitled to both, or to one only. And on this point likewise the intention of the testator is the rule of construction (*p*).

Distinction between cumulative and repeated Legacies.

[“ On this head there are three classes of cases ; first, those cases in which there is no evidence of such intention, either internal or extrinsic, one way or the other ; those cases where there is internal evidence ; and also those in which there is extrinsic evidence.

[“ In regard to the first, where there is neither internal nor extrinsic evidence, it is necessary to recur to the rule of law (*q*). There are four instances of this class :

[“ Where the same specific thing is bequeathed to A. twice in the same will, or in the will and again in a codicil : in that case he can claim the benefit only of one legacy, because it could be given no more than once (*r*).

[“ Where the like quantity is bequeathed to him twice by one and the same instrument : there also he shall be entitled to one legacy only (*s*). So where an unconditional legacy was given by a third testamentary paper, it was held to be a substitution for a conditional legacy to the same amount, given by the first testamentary paper (*t*).

[“ Where the bequest to him is of unequal quantities in the same instrument, the one is not merged in the other, but he has a right to them both (*u*).

[“ And lastly, where the bequest to him is of equal or unequal quantities by different instruments, in that case also there shall be an accumulation (*x*).

[“ There are likewise cases in which there is internal evidence of the testator's intention ; as where a latter codicil appears to be merely a copy of the former, with the addition of a single legacy ; or where both legacies are given for the same cause ; they shall not be cumulative, whether given by the same or different instruments, as they shall be where one is given generally, and the other for an express purpose ; or where one reason is assigned for the former, and another for the latter ; or where the legacies are not *ejusdem generis*, as where an annuity and a sum of money is given (*y*), or two

(*p*) [4 Bac. Abr. 361 ; *Ridges v. Morrison*, 1 Bro. Ch. Rep. 389 ; *Coote v. Boyd*, 2 Bro. Ch. Rep. 527.]

(*q*) [*Hooley v. Hatton*, 1 Bro. Ch. Rep. 391, in note.]

(*r*) [1 Bro. Ch. Rep. 392, in note, and *ibid.* 393.]

(*s*) [1 Bro. Ch. Rep. 392, in note ; *Swinb.* p. 7, s. 21 ; 1 Bro. Ch. Rep. 30, in note ; 4 Bac. Abr. 361 ; *Masters v. Masters*, 1 P. Wms. 424.]

(*t*) [*Attorney-General v. Harley*, 4 Madd. Rep. 263 ; and see *Gillespie v. Alexander*, 2 Sim. & Stu. 145.]

(*u*) [1 Bro. Ch. Rep. 392, in note ; *vide Coote v. Boyd*, 2 Bro. Ch. Rep. 521.]

(*x*) [1 Bro. Ch. Rep. 391, 392, in note ; *Masters v. Masters*, 1 P. Wms. 423 ; 1 Ch. Ca. 361 ; *Foy v. Foy*, 1 Cox's Rep. 163 ; *Baillie v. Butterfield*, *ibid.* 392 ; *Benyon v. Benyon*, 17 Ves. 34.]

(*y*) [*Masters v. Masters*, 1 P. Wms. 423 ; see also the recent cases of *Robley v. Robley*, 2 Beav. 95 ; *Tweeddale v. Tweeddale*, 4 Jurist, 885.—Ed.]

annuities of the same amount, by different instruments, the one payable quarterly, the other half-yearly (*z*): or two annuities of different amounts, the one given by the will, payable out of real estate, the other by the codicil, payable out of personal estate (*a*). In like manner it may be collected from the context, whether the testator meant a duplication or a mere repetition of the first bequest. And his intention has been inferred from very slight circumstances (*b*).

Extrinsic
Evidence.

[“Extrinsic evidence is also admissible on this subject. Whether the testator, by giving two legacies, did or did not intend the legatee to take both, is a question of presumption, which will let in every species of proof (*c*). Hence, if the testator, after the making of the will, and before the date of the codicil, had an increase of fortune, that circumstance has been held to prove that he intended an additional bounty” (*d*).

[As to parol evidence of the testator’s intention, the primary rule is, that it is not admissible against the expressed effect of a written instrument (*e*). But there is a manifest difference between the admission of parol evidence as to declarations, whether verbal or written, of a testator, and as to the proof of facts or circumstances, by the knowledge of which the court may be placed in the same situation with the party who made the instrument (*f*).—ED.]

Things which
a Person hath
jointly with
another.

A devise by one joint tenant of land devisable, which he holdeth in fee, at his death, jointly with a stranger, is not good; but if such devisor doth survive all his companions, then such devise is good (*g*).

Also a man cannot bequeath by will any of those goods or chattels which he hath jointly with another, though by act in his lifetime he might dispose of his part; if he bequeath his portion thereof to a third person, the legacy is void, and the survivor shall have the whole, notwithstanding the will. But joint merchants are to be excepted out of this rule; for the wares, merchandizes, debts, or duties which they have as joint merchants or partners, shall not survive, but shall go to the executor of him that dies; and this by the law of merchants (*h*).

And by the custom of the city of London, he which holdeth

(*z*) [*Currie v. Pye*, 17 Ves. jun. Rep. 527, 528; 4 Bac. Abr. 361, in note.]

(*a*) [*Wright v. Lord Cadogan*, 2 Eden’s Rep. 239.]

(*b*) [4 Bac. Abr. 361; *Duke of St. Alban’s v. Beauclerk*, 2 Atk. 640; *Ridges v. Morrison*, 1 Bro. Ch. Rep. 389; *Coote v. Boyd*, 2 Bro. Ch. Rep. 521; 1 P. Wms. 424, in note 2; *Benyon v. Benyon*, 17 Ves. jun. 34.]

(*c*) [*Coote v. Boyd*, 2 Bro. Ch.

(*d*) [*Masters v. Masters*, 1 P. Wms. 424.]

(*e*) [*Hurst v. Reach*, Sir J. Leach, V. C. 5 Madd. 351.]

(*f*) [*Sharp v. Sharp*, Lord Brougham, 1 M. & K. 589. See V. Williams on Ex. and Ad. v. ii. p. 1020.]

(*g*) Perk. 219.

(*h*) Law of Test. 188.

tenements in London jointly with others may devise that which belongeth to him without any other severance (i).

[The 1 Vict. c. 26, which does not affect wills made before Jan. 1, 1838, by its 33rd section enacts—

“That where any person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.”

Lapsed Legacy.

Gifts to Children or other Issue who leave Issue living at the Testator's Death, shall not lapse.

[But as to wills made before this act, it may be laid down that] generally, *if the legatory die before the legacy be due, the legacy is extinguished*. Insomuch that if the testator by his last will do bequeath his lands and tenements to a man and his heirs, yet if such person die before the testator, the devise is merely void, and his heirs cannot recover the land by force of the will, because the devisee was not in being when the will should take effect; and the word heirs in this case is not a designation of the person who shall take, but a limitation of the estate; for if it was a description of the person, then his widow would be endowed (k).

In what cases a Legacy shall be said to lapse,

And so it is if the devisee of a copyhold die before the devisor, notwithstanding the surrender by the devisor of the copyhold to the use of his will (l).

And so also it is if the legatee lives as long as the testator, but doth not survive him; for they may both die at one instant; as in a storm at sea they may both be drowned together, or by the falling of a house may both be killed at once: but if the legatee overlive the testator, even though it be but for a moment, the legacy is due, and may be recovered by the executors or administrators of the legatee (m).

[*Taylor v. Diplock* (n). A husband appointed his wife executrix and residuary legatee; both were drowned in the same ship. According to the practice of the Prerogative Court, if the wife had lived to be entitled as residuary legatee, her next of kin would have had a right to the administration in preference to the next of kin of the husband. Sir John Nicholl held, that as the next of kin of the husband had a *primâ facie* right, he was entitled to it on the assumption—there being no evidence to the contrary—that he and the wife perished at the same moment.—ED.]

(i) Privileg. Lond. 145.

(k) Plowd. 345; Swin. 35, 560; Law of Test. 230.

(l) Str. 445.

(m) [Swinb. pt. 7, s. 23, pl. 1; Godolph. pt. 3, c. 25, s. 25; Wentw. Off. of Ex. 436, 14th ed.]

(n) [2 Phillim. 261; see also *In the goods of Selwyn*, 3 Hagg. 748; *Sutterwayte v. Powell*, 1 Curt. 705; *In the goods of Murray*, 1 Curt. 596; see also, on this point, *Wright v. Sarmuda*, 2 Phillim. 266; *Calvin v. Procurator-General*, 1 Hagg. 92.]

Criterion of
a lapsed or
vested Le-
gacy.

Snell v. Dee, M., 6 Ann. (o) The testator bequeathed by his will in these words: I give 100*l.* apiece to the two children of J. S. at the end of ten years after my decease. The children died within the ten years. And by Cowper, Lord Chancellor: This is a lapsed legacy, and shall not go to the executors of the children; *for the diversity is, where the bequest is to take effect at a future time, and where the payment is to be made at a future time*: wherever the time is annexed to the legacy itself, and not to the payment of it, if the legatee dies before the time of payment, it is a lapsed legacy in that case.

Where the
Surplus is
bequeathed,
and one of
the residuary
Legatees dies
in the Life of
Testator.

Bagwell v. Dry (p), T., 1721. The testator, amongst other things, bequeathed the surplus of his personal estate unto four persons, equally to be divided among them, share and share alike, and made A. B. his executor in trust. One of the four residuary legatees died in the life of the testator. After which the testator died. And the question being, to whom the fourth part devised to the residuary legatee who died in the life of the testator belonged, the Lord Chancellor, after time taken to consider of it, delivered his opinion, that the testator, having devised his residuum in fourths, and one of the residuary legatees dying in his lifetime, the devise of that fourth part became void, and was as so much of the testator's estate undisposed of by the will; that it could not go to the surviving legatees, because each of them had but a fourth part devised to him in common, and in the death of the fourth residuary legatee could not avail them, as it would have done had they been all joint tenants, for then the share of the legatee dying in the lifetime of the testator would have gone to the survivors; but here the residuum being devised in common, it was the same as if the fourth part had been devised to each of the four, which could not be increased by the death of any of them. This share shall not go to the executor, he being but a bare executor in trust; and consequently it belongs to the testator's next of kin, according to the statute of distribution; and as to this, the executor is a trustee for such next of kin.

Page v. Page (q), M., 2 Geo. 2. A person deviseth to his six relations all his lands and all his personal estate, in trust to perform his will; and after all these things discharged, directed that the remainder should be equally divided amongst them, share and share alike, and made his said six relations executors. One of the six legatees died, and then the testator died. The question was, whether the share of that legatee who died in the lifetime of the testator should go to the surviving legatees as part of the residuum; or whether in this case it should go to the next of kin of the testator, as so much of

(o) 2 Salk. 415.

(q) Stra. 820.

(p) 1 P. Wms. 700.

his estate undisposed of. It was argued, that where there is a lapsed legacy, it falls into the residuum of the personal estate generally; but here a part of the residuum itself is a lapsed legacy, and consequently undisposed of, and ought to go to the next of kin of the testator. For the executors are to take nothing as executors, but as residuary legatees. And one of the legatees dying in the lifetime of the testator, his share must go according to the statute of distributions, as undisposed of. And so it was decreed.

Where the Surplus is bequeathed, and one of the residuary Legatees dies in the life of Testator.

Elliot v. Davenport, M., 1705 (r). The testator, by his will reciting that B. owed him 400*l.*, gave and bequeathed the same to him, provided that out of it he paid several particular sums in the will mentioned, to his wife and children, and the residue he freely and absolutely gave him, and required his executor, immediately on his death, to deliver up the security, and not to meddle with the debt, but to give such release as B., his executors or administrators should require; B. died in the lifetime of the testator. It was held, that the money directed to be paid to the wife and children was well devised; but as to the residue devised to the debtor himself, it was a lapsed legacy, he dying in the lifetime of the testator; but it was admitted, that if the testator had said, "*I forgive such a debt*," or that my executor shall not demand it, or shall release it, that would have been a good discharge of the debt though the debtor had died in the lifetime of the testator.

A Debt considered as a Legacy.

[And even where a legacy is given to the legatee, and his executors, administrators and assigns, the previous death of the legatee will cause a lapse (s).—ED.]

Willing v. Bane, T., 1731 (t). The testator devised by his will, 200*l.* a piece to his children, payable at their respective ages of twenty-one; and if any of them died before twenty-one, then the legacy given to the person so dying to go to the surviving children; one of the children died in the testator's lifetime. And the question was, Whether the legacy should go to the surviving children, or should be a lapsed legacy, and sink into the surplus. By the court: The rule is true, that where the legatee dies in the life of the testator, his legacy lapses, that is, it lapses as to the legatee so dying; but in this case the legacy is well devised over to the surviving children.

When a Legacy is devised over.

[The rule of lapses, according to this and other authorities, may be controlled by the manifest intention of the testator appearing on the face of the will that he did not intend it to lapse, but then there must be either an express declaration of

(r) 2 Vern. 521; 1 P. Wms. 83; *Holbrook*, C. & J. 114.]

[See also *Maitland v. Adair*, 3 Ves. 231; *Toplis v. Baker*, 2 Cox, 118; *Sibthorp v. Moxom*, 3 Atk. 580; *Iron v. Butler*, 2 Price, 34; *Att.-Gen. v.* (s) [*Corbyn v. French*, 4 Ves. 418, 435; *Tidwell v. Ariel*, 3 Madd. 403.]

(t) 3 P. Wms. 114.

the person he intends to substitute for the legatee, or such terms employed as may allow the substitute to be fairly inferred from them (*u*); and it has been held recently, that where there is a bequest "to A., or his personal representatives," or "his heirs," that the lapse, generally speaking, is avoided by the word "or" (*x*).

[It seems, however, that it is not allowable to prove this intention by evidence *dehors* the will (*y*).—ED.]

Effect of
general resi-
duary Clause
in case of
Lapse.

A general residuary clause passes all that is undisposed of, as in case of a lapse (*z*). Therefore, a leasehold house, the bequest of which to a charity failed, was held to pass under a general disposition of the residue, and not to belong to the next of kin as undisposed of (*a*).

Campbell v. French (*b*). Testator by his will gave legacies to A. and B., describing them as grandchildren of C., and resident in America. By a codicil he revoked these legacies, giving as a reason that the legatees were dead. The fact not being true, they were held entitled on proof of identity.

Hixon v. Oliver (*c*). Testator devised to his wife, "The sum of 300*l.* to be disposed of as she thinks proper, to be paid after his death." It was held to be an absolute interest, and transmissible to her administrator, she having died intestate.

Bradley v. Westcott (*d*). Testator devised 500*l.* to his wife, according to her appointment by will, and in default thereof to fall into the residue, which was disposed of. It was held that the power of appointment was not executed by such general words in her will, as "all my personal estate," &c., and "all my estate and interest therein."

Godfrey v. Davis (*e*). Testator bequeathed an annuity over upon the death of the annuitant to the eldest child of A., and there being no child at his death, it was held that an afterborn child was not entitled.

In general, where a sum of money, or residue of personalty is bequeathed to A. for life, and then, or if he died without issue, or marry, in whole or in part to B.; B.'s legacy is considered as a vested remainder, and transmissible if he survive the testator, although he die in the lifetime of A. (*f*). And

(*u*) [*Sibley v. Cook*, 3 Atk. 572; *Toplis v. Baker*, 2 Cox, 121; *Bridge v. Abbott*, 3 Bro. C. C. 124.]

(*x*) [*Gittings v. M'Dermot*, 2 My. & K. 69; *Pearson v. Stephen*, 5 Bligh. N. C. 203; 2 Dow. & Cl. 328 (Lord Chancellor Brougham).]

(*y*) [*Maybank v. Brooks*, 1 Bro. C. C. 84.]

(*z*) *Brown v. Higgs*, 4 Ves. 708.

(*a*) *Shanley v. Baker*, 4 Ves. 732.

(*b*) 3 Ves. 321.

(*c*) 13 Ves. 108.

(*d*) 13 Ves. 445.

(*e*) 6 Ves. 43.

(*f*) *Pinbury v. Elkin*, 1 Wms. 563; *Atkinson v. Paice*, 1 Bro. 91; *Barnes v. Allen*, *ibid.* 181; *Godwin v. Munday*, *ibid.* 191; *Monkhouse v. Holme*, *ibid.* 298; *Att.-Gen. v. Crispin*, *ibid.* 386; *Devisme v. Mello*, *ibid.* 537; *Dansen v. Hawes*, Amb. 276; *Earl of Salisbury v. Lambe*, *ibid.* 383; *Benyon v. Maddison*, 2 Bro. 75.

if such be the construction of the will, the court will secure the fund, and order the produce to be paid accordingly (*g*).

Devise of a legacy to a person and his assigns, the legatee died before it was paid; adjudged, that his administrator shall have it as assignee in law (*h*).

Where the *legacy is conditional, the legacy is not due until the condition be performed*, and therefore if the legatee die before the condition is performed, the legacy is extinguished, except in some few cases (*k*). Conditional Legacy (*i*).

If a legacy be given to a child payable at his age of twenty-one years, and the child dies before he attain that age, though the administrator of the child is entitled to the legacy, yet he shall not have it till such time as the child, if he had lived, would have attained his age of twenty-one years (*l*).

But if a legacy be devised to a child payable at his age of twenty-one years, and if he dies before that age, then the legacy to go over to another; in this case, if the child dies before he attains the age of twenty-one, the second legatee shall have the legacy immediately (*m*).

So if a legacy be given to an infant, to be paid at his age of twenty-one years, and the executors to pay interest for it until it becomes payable; if the infant dies before twenty-one, it is due presently to the executor or administrator of the infant; but if no interest was to be paid for it, then it shall not be paid until such time as the infant would have come to twenty-one in case he had lived, because there it is a benefit the testator intended to the executor by keeping it in his hands, but in the other case it would be none when interest was payable (*n*).

So where the testator bequeathed to an infant 1000*l.* payable at twenty-one, and in the meantime the infant to have the yearly sum of 20*l.*, not amounting to the interest of the legacy given him; the infant died before twenty-one. It was held by Raymond, Chief Justice, Jekyl, Master of the Rolls, and Eyre, Chief Justice, that the executors of the infant should wait for their legacy till such time as the infant, had he lived, would have been twenty-one; it being unreasonable that the executors of the infant, standing in his place, should be in a better case than the infant himself would have been had he been living, and it was to be presumed, that the testator had made a computation of his estate, and considered when the same would bear and allow of the payment of this legacy;

(*g*) *Green v. Pigot*, 1 Bro. 103; *Ed.*

Billings v. Sandem, *ibid.* 393; *Nowlan v. Nelligan*, *ibid.* 489; *post*, "Payment of Legacies."

(*h*) 1 Rolle's Abr. 915.

(*i*) [Conditions in restraint of marriage have been considered above.—

(*k*) Law of Test. 231.

(*l*) 2 Vern. 199; 1 P. Wms. 478.

(*m*) 2 Vern. 283; 2 P. Wms. 478; *Viner, Devise*, G. d. 35. (*Laundy v. Williams.*)

(*n*) 2 Freem. 64.

and that no reason could be given, why an uncertain accident should accelerate the payment of this legacy before the time which was at first intended for that purpose (o).

Joseph Smith gave all his personal estate to his wife upon the following considerations, *inter alia*, that at the decease of his said wife, or if she should marry again, 500*l.* be paid to his sister Sarah Smith out of the aforesaid estate within six months after her decease or marriage. Sarah Smith died, living the wife, and the Court of Exchequer held, that the legacy was not given till after the wife's death or second marriage, and therefore lapsed (p).

Legatee in trust.

[But where a bequest is made to a man as trustee for another person, the legacy will not lapse by the death of the trustee in the testator's lifetime (q).—Ed.]

General rule. Distinction as to whether the Time be joined to the Substance or to the Payment of the Legacy.

Generally, it is to be considered, whether the time be joined to the substance of the legacy, or to the payment. 1. If it be joined to the substance of the legacy, and the legatee dies before the day, the legacy is gone (r); as if the testator gives to B. 100*l.* when he cometh to the age of twenty-one years, and B. dieth before, the legacy will not go to his executors or administrators. 2. But if the day be joined to the payment of the legacy (s), the executors or administrators of the legatee shall have the legacy, though the legatee die before the day; as if the testator bequeath 100*l.* to B., and wills that it shall be paid to B. when he attains the age of twenty-one years, yet his executors or administrators may recover the legacy when the time is expired that B. should have attained that age if he had lived (t).

Interim Interest.

And this is agreeable to the rule of the civil law, which is, that if a legacy be devised to one generally, to be paid or payable at the age of twenty-one, or any other age, yet this is such an interest vested in the legatee that his executor or administrator may sue for and recover it; for it is *debitum in præsentia*, though *solvendum in futuro*, the time being annexed to the payment, and not to the legacy itself. So if the legacy

(o) *Chester v. Painter*, 2 P. Wms. 335.

(p) *Norris v. Huthwaite*, 1 Bro. 182.

(q) [*Eales v. England*, 2 Vern. 468; *Oke v. Heath*, 1 Ves. sen. 140; *Inchiquin v. French*, 1 Cox, 1.]

(r) [*Anslow v. South*, 1 Eq. Cas. Abr. 295, pl. 6; *Cruse v. Barley*, 3 P. Wms. 20; *Snell v. Doe*, 6 Ves. 243; *Stapleton v. Cheales*, Prec. Ch. 317, in which it was held, that the expressions "at twenty-one," or "if," or "when he shall attain twenty-one," were one and the same. Sir W. Grant remarked in *Hanson v. Graham*, that

in the civil law the words "*cum*" and "*si*" are precisely equivalent, and that from that law we borrow all, or at least the greatest part, of our rules upon legacies, 6 Ves. 243—245; see also *Atkinson v. Turner*, for the word *provided*, 2 Atk. 41, and *Elton v. Elton*; for *in case*, 3 Atk. 504; and *Knight v. Cameron*, 14 Ves. 389.—Ed.]

(s) [*Jackson v. Jackson*, 1 Ves. sen. 217; *Sydney v. Vaughan*, 2 Bro. Parl. Cas. (House of Lords), 254; *Bolyer v. Mackell*, 5 Ves. 509.]

(t) [Swinb. part 7, s. 23, U. 9.]

is made to carry interest (*u*), though the words *to be paid* or *payable* be omitted, it shall be an interest vested. But if a legacy be devised to one *at* twenty-one, or *if* or *when* he shall attain the age of twenty-one, and the legatee dies before he attains that age, the legacy is lapsed. But where the legacy is to arise out of a *real* estate, this, by the better authorities, shall not go to the representative of the legatee, but shall sink in the inheritance for the benefit of the heir, as much as if it was a portion provided by a marriage settlement. But when the legacy is to be paid out of a *personal* estate, the above distinction hath been allowed of, and Cowper, Lord Chancellor, said, that though it was at first introduced upon very slender reasons, and probably upon no other but from a constant willingness in the civil law to stretch in favour of a particular legatee, against the residuary legatee who went away with the whole surplus of the personal estate, *yet as the Chancery hath now a concurrent jurisdiction with the spiritual court in matters of this nature, he thought it highly reasonable that there should be a conformity in their resolutions*, that the subject might have the same measure of justice, in which court soever he sued (*x*).

Where the Legacy is to arise out of a *Real Estate*.

Concurrent Jurisdiction of Chancery and Ecclesiastical Courts in personal Legacies.

So, in the case of *Boycot and others v. Cotton and others*, Nov. 24, 1738 (*y*), it was said by the lord chancellor Hardwicke, that it is now settled, whether the portion charged upon land be given with or without interest, by deed or by will, if the person dies before the age at which it becomes payable, it shall sink into the estate.

Legacy from Land.

Smith v. Smith, M., 1682 (*z*). The testator devised 100*l.* to his daughter for her portion, chargeable upon a *real* estate, and payable at twenty-one: and the daughter died before twenty-one: the portion shall sink in the land. But it is otherwise, if no time had been limited for the payment of the portion; for in that case it goes to the executor of the daughter. And there is no difference, whether the portion is secured by settlement or by will, if it be to be raised out of a real

(*u*) [This is generally called the gift of *interim* interest. See Fearne on Contingent Remainders, 553, note by Mr. Butler; *Vawdry v. Geddes*, 1 Russ. & M. 208; *Hoath v. Hoath*, 2 Bro. C. C. 4; *Fonereau v. Fonereau*, 3 Atk. 645; *Murkin v. Phillipson*, 3 M. & K. 257; *Stephens v. Frost*, 2 Younge & C. 302; *Vivian v. Mills*, 1 Beav. 315; *Cromek v. Lumb*, 3 Yo. & C. 565. In the recent case of *Watson v. Hayes*, 9 Sim. 500, 25*l.* was directed to be paid to a person for maintenance and education till she attained the age of twenty-one, when she was to receive 500*l.*; she died under age. Sir

L. Shadwell, V.C., held the legacy to be vested, but Lord Chancellor Cottenham reversed his decision, 4 Jurist, 186. See cases cited in argument.—Ed.]

(*x*) [Swinb. part 7, s. 23, pl. 9; Godolph. part 3, c. 24, s. 25; *Stapleton v. Cheales*, Prec. Chanc. 317.]

(*y*) 1 Atk. 555. [See Fearne, Cont. Rem. 555, note by Mr. Butler. The leading case on this subject is *Poulet v. Poulet*, or *Pawlet v. Pawlet*, 2 Ventr. 366; 1 Vern. 204; 1 Rep. Leg. 554, 3d ed.; V. Wms. on Ex. and Ad. vol. ii. p. 993.—Ed.]

(*z*) 2 Vern. 92.

Legacy from
Land.

estate, and the party dies before it is payable; for in either case it sinks in the lands.

Norfolk v. Guildford, H., 1690 (a). The testator by will charged his lands with 6000*l.* for the child his wife was then *enciente* with, if it proved a daughter; with a clause of entry for non-payment. A daughter is born, who dies. It was decreed, that the 6000*l.* should not be raised for the benefit of her administrator.

Bartholomew v. Meredith, M., 1684 (b). The testator devised lands to be sold for payment of portions to younger children, and one of the children dies after the portion was payable, though before the lands sold. It was held, that it being an interest vested, his administrator should have it.

Jackson v. Farrand, E., 1701 (c). The testator by will gave 500*l.* to his daughter, to be paid by his executor at the age of twenty-one out of his personal estate and the rents of his real; and, if not raised by that time, the executors to stand seised and take the rents till 500*l.* is raised, and, after payment, gives the land to his son. The daughter marries at eighteen, and dies under twenty-one, leaving issue a daughter. The husband takes administration. It was held, that the portion should be raised, and that by a sale, though the land would produce little more than the 500*l.* But this, Lord Hardwicke said, is an anomalous case, and no stress ought to be laid upon it (d).

Lowther v. Condon, H., 1740 (e). Thomas Condon, esquire, by his will gave unto his daughter Diana Condon the sum of 1000*l.*, to be raised and paid unto her, immediately after the decease of her mother, out of the mother's jointure lands, with interest of six pounds in the hundred from the death of her mother till the same should be paid. Thomas Condon dies. After which, his daughter Diana intermarries with Sir William Lowther, and dies in the lifetime of her mother. Last of all the mother dies. And Sir William Lowther, as administrator to his wife, brings his bill for the recovery of the 1000*l.* It was insisted by the defendant, the heir at law, that as the said sum was to be raised and paid out of the lands, and the late Lady Lowther died before the time when this sum became payable, namely, before the death of her mother, the testator's widow, the same ought to sink into the estate for the benefit of the heir, and ought not now to be raised. By Hardwicke, Lord Chancellor: It is clear, if this were to be paid out of a personal estate, it would have been transmissible to an administrator. It is indeed true, that it hath been an established rule in general, as to real estates, that where a legatee dies before the time of payment of the legacy, it shall sink into the estate; but with regard to portions or fortunes for daughters,

(a) 2 Vern. 208.

(d) 1 Atk. 556.

(b) 1 Vern. 276.

(e) 2 Atk. 127, 130; 3 Atk. 319.

(c) 2 Vern. 424.

the circumstance of the legatee is to be considered; as where a portion is given to one immediately, payable when she attaineth the age of twenty-one, or marrieth, and such person dieth before either of the contingencies happeneth, it ought to sink, because the legatee wanted no personal provision; but in this case, as Lady Lowther was married, and lived married for some years, there is the less reason that it should sink. And it was decreed, that this was an interest vested, and as such transmissible to the administrator, and the legacy should not sink into the estate for the benefit of the heir at law. But this determination was upon particular circumstances in the will, manifesting an intention that the portion in this event should not sink into the inheritance, but be transmissible; and particularly because the remoteness of the time of payment did not arise from the circumstances of the persons, but of the estate; the legacy being ordered to be paid as soon as the estate should be disincumbered. And upon the same ground, the like was determined afterwards in the case of *Sherman v. Collins*, Feb. 4, 1745.

Legacy from
Land.

But it is said, if a legacy be chargeable *both* upon the real and personal estate, then so much thereof as the personal estate will extend to pay shall go to the executors or administrators of the child; for in such case, as far as the executor or administrator claims out of the personal estate, he shall succeed according to the rule of the spiritual court where these things are determinable, although the infant legatee dies before the portion or legacy becomes due: but so far as such legacy is charged upon the land, the Court of Chancery will not countenance the loading of an heir, merely for the benefit of an administrator (*f*).

Legacy from
Mixed Fund.

But in the case of *Van v. Clark*, July 1, 1739 (*g*), Lady Craven devised to Godfrey Clark (whom also she made executor and residuary legatee) her messuage and tenement in Lincoln's-Inn-Fields, and all her real and personal estate not otherwise disposed of, to the intent that out of the said real and personal estates so devised, her several legacies might be paid: amongst which, she gave to Thomas Lewis, to be paid within one year and a half after her decease, 2000*l.* in trust and for the use of his daughter Mary Lewis, to be put out at interest, and the principal and interest to be paid to her at her age of eighteen, or marriage, which should first happen. Thomas Lewis died in the lifetime of the testatrix. Mary Lewis died about half a year after the testatrix, unmarried. The representative of Mary brought his bill to have the 2000*l.* paid to him. The defendant Clark admitted personal assets sufficient, but submitted to the court, whether the plaintiff was entitled, and insisted that the house in Lincoln's-Inn-

(*f*) 1 P. Will. 276, 601.

(*g*) 1 Atk. 510.

Legacy from
Mixed Fund.

Distinction
between Le-
gacies from
Real and Per-
sonal Estates
and out of
Mixed Fund.

Fields was in the first place charged with this, and that it was not a charge merely on the personal estate, but on the mixed fund of real and personal; and therefore the legatee dying before the day of payment, it ought to sink. By the Lord Chancellor Hardwicke: "The infant dying before the time of payment to the trustee, I am of opinion makes this legacy not raisable for the benefit of the plaintiff her representative. *If a legacy is given out of a personal estate payable at a certain time; or if given at a certain time, and interest in the mean time; it is a vested legacy. But the rule of this court as to legacies out of real estates is otherwise; for if given at a certain time, or payable at a certain time, yet if the legatee dies before the time is come, it sinks into the inheritance. So when a legacy is given out of a mixed fund of real and personal estate, at a certain time, or to be paid at a certain time; the construction is the same, as if given out of a real estate only. There is but a slight difference between the cases of legacies given at a day, or payable at a day; but the distinction is adhered to, only to give a consentaneous jurisdiction with the ecclesiastical courts: nor is there any case that I know of, to warrant a distinction between legacies given out of a mixed fund of real and personal estate, and out of real estate only. If the infant had survived the year and half (for the death of the trustee makes no distinction) it would have been extremely clear she would have been entitled to the legacy; and if then she had died before eighteen or marriage, her representatives would have been entitled. But if this had been merely personal, as she died within the year and half, her representative could not have been entitled; for the whole gift is in the direction of the payment, which makes that the substance. In the present case, it is not a legacy merely out of a personal estate, but out of both funds, and the real charged in the first place on the estate in Lincoln's-Inn-Fields. And this construction is more agreeable to the intention of the testatrix, as the sum was intended clearly as a portion for Mary. And the court always goes as far as it possibly can, to hinder the raising portions out of land for the benefit of representatives."*

This distinction between a portion and other legacy was recognized in *Dawson v. Killet (h)*. Where the testator gave an estate to his wife for life, and if there should be no issue between them, then to Killet charged with several sums to different legatees. One of these survived the testator, but died before the wife; and Lord Thurlow, C., held the charge vested and transmissible to his representatives, for "in the case of a portion, the court has construed a sum so given to be so connected with the purpose for which it was given, that it was not intended to be given for any other purpose; so that the purpose failing, the land ought not to be charged." But "this is a devise after the death of the wife to Killet, and the

testator charges the estate of Killet (meaning the interest of Killet in the estate) with the sums in question, which distributes the estate between Killet and the legatees. Upon the death of the testator, the remainder vested in Killet, and the moment it vested in Killet, the charges vested in those to whom they were given (*i*). And in *Embrey v. Martin* (*k*), Lord Hardwicke said of such a legacy, it is a conditional limitation, and there is a legal remedy for raising the money: it is a condition subsequent, as all conditions turned into limitations are. It is to be raised after J. T. (the remainder man) comes into possession. Note. A legacy may vest, subject to be divested, by a subsequent appointment of a person to whom the testator gives such power, or by the birth of another child, or the legatee's dying under twenty-one, &c. (*l*).

Distinction between Legacies from Real and Personal Estates, and out of Mixed Fund.

12. Residue, &c.

The question how far the executor shall be entitled to the surplus, although he be not by the express words of the will appointed residuary legatee, hath been long litigated and received a diversity of determinations.

In the case of *Foster v. Munt*, M., 1687 (*m*), the testator devised particular legacies to his children and grandchildren, and 10*l.* a piece to his executors for their care, the surplus of the personal estate being 5000*l.* and upwards. The question was, whether the surplus should be a trust for the children, or go to the executors: and it was decreed a trust for the children. For as the legacy to the executors was given for their care, unless such care was to turn to the benefit of others, and not of themselves, the will would be absurd; and therefore it necessarily followed, that the testator designed them only to be trustees for the next of kin. And although no such declaration had been made, yet the legacy being given generally, the law made the same construction, and it was for their care; it being impossible to imagine that the testator would give a general legacy if he intended the executor should take the whole (*n*).

Surplus, how far Executor entitled to, when not appointed, in express Words, Residuary Legatee.

Earl of Bristol v. Hungerford, H., 1697 (*o*). The testator devised lands to be sold for payment of his debts, and ordered that the surplus should be deemed part of his personal estate, and go to his executors, and gave to his executors 100*l.* a piece as a legacy. The question was, whether the executors

(*i*) See also *Tunstal v. Bracken*, [Duke of Chandos v. Talbot, 2 P. 1 Bro. C. C. 124, 2d ed.; S.C. Amb. Wms. 601; *Prowse v. Abingdon*, 1 167; *Manning v. Herbert*, ib. 575; Atk. 482; 1 Rop. Leg. 558, 3d ed. *Jeale v. Tickener*, ib. 703. —ED.]

(*k*) Amb. 230.

(*m*) 1 Vern. 473; 2 Vern. 648.

(*l*) *E. of Salisbury v. Lambe*, Amb. 383; *Shepherd v. Ingram*, ib. 448;

(*n*) 2 Abr. Cas. Eq. 443.

Walcott v. Hall, 2 Bro. C. C. 305;

(*o*) 1 Abr. Cas. Eq. 244.

Surplus, how
far Executor
entitled to
when not ap-
pointed, in
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Words, Re-
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should have the surplus to their own use, or should distribute according to the statute of distributions. For the executors it was insisted that the surplus should be part of his personal estate, and go to them, and that he meant it to their own use; and his giving them a legacy of 100*l.* a piece cannot alter the case, for the surplus might perhaps be nothing; and therefore he gave them the 100*l.* that they might at all events be sure of something, and not to exclude them the benefit of the surplus: and this being a devise of the surplus, after debts and legacies paid, cannot be a trust in them, for then all their trust is performed when debts and legacies are paid. On the other side it was said that the words in the will that the surplus should be part of his personal estate, and *go to his executors*, were only intended to exclude the heir, who else would have had it, and not to give any greater interest to his executors than they would have had otherwise. And of that opinion was the lord chancellor, who decreed that they were trustees of the surplus for the next of kin.

But in the case of *Griffiths v. Rogers*, T., 1704 (*p*), where a man deviseth his library of books to one, except ten books such as his wife should chuse, and made her executrix, it was decreed that she should not by this devise be excluded from the benefit of the surplus of the personal estate.

In the year 1725, in order to settle this point, the Lord Chancellor King brought a bill into the House of Peers, which passed that house, but was thrown out by the Commons. The bill was to have settled it for the benefit of the executor (*q*).

Newstead v. Johnson, July 15, 1740 (*r*). Grace Lawson by her will gave several legacies to her children, and then directs 1000*l.* to be taken out of her partnership stock in trade, and settled in strict settlement on her son; the residue of her partnership stock she gave to a trustee, with very particular directions as to the management, in trust for the separate use of her daughter Elizabeth Johnson, who was a *feme covert*, and appoints Elizabeth Johnson her executrix, but makes no disposition of the surplus. The bill was brought for an account of this surplus, and that the executrix might be a trustee of the same for the next of kin to the testatrix. By the Lord Chancellor Hardwicke: "The cases in regard to excluding executors from taking the surplus of the personal estate, by reason of the particular legacies before given to them, have been very various, and undergone different determinations, according to the different circumstances and opinions, and way of reasoning of different persons concerning them; and it is absolutely impossible to reduce all those cases to any certain general rule, without some contrariety between them. But I think the present case a very plain one, that the executrix here should not be excluded from the surplus.

(*p*) 1 Abr. Cas. Eq. 245.

(*q*) Stra. 569.

(*r*) S. C. 2 Atk. 46.

*The law is clear, that where a man makes his will, and an executor, it is a gift in law of all his personal estate to him. So is the rule of the ecclesiastical court. Therefore it is, that where a suit is brought in such a case for a distribution of the residuum undisposed of by the will, this court will prohibit them from proceeding in such suit; because they are bound to give the residuum to the executor. And this court interposes upon a supposed trust in the executor, of which that court has no cognizance. And I remember some cases, one at the latter end of Queen Anne's time, and another since, and another when I sat as chief justice in the King's Bench, where such prohibitions have gone. So that the ground upon which executors have been in any cases compelled to distribute the surplus, has been, upon certain circumstances in equity, which have induced a violent presumption amounting to evidence that the executor was intended only a trustee. The first case was *Foster v. Munt*, where it was sent to the master to inquire what the surplus amounted to: and I have heard that arose in a great measure from an ill opinion the Lord Chancellor Jefferies had of the executor's behaviour in obtaining that will; and it being reported to amount to 5000*l.*, he thought it was absurd to say the testator would have given the executor so small a legacy as 10*l.* for his care and pains, if he had meant at the same time to give him the surplus. But there was no particular evidence of any fraud in the case, but only such a general charge in the bill; so that the decree was founded wholly on that single point. From that time it was taken, where a legacy was given to an executor for his care and trouble, without any disposition of the surplus, that he should be considered as a trustee: and that was founded upon good reason; for such a legacy for care and pains was a plain declaration of the testator's intention, that as to the rest the executor should not take it to his own use; for it were ridiculous to suppose that the testator should give him a small legacy for his trouble in managing an estate for himself. Afterwards the court went further in the like kind of reasoning, and held, that where a particular legacy was given to the executor generally, without saying for care and pains, even this would exclude him from the surplus because of the absurdity (as no doubt there would be) in giving him some, and giving him all. From whence the court raised an implication, that since the testator had given him a part, he never intended him the whole. And this point is now established, though it was at first objected that the particular legacy might be owing to a doubt of the testator that the whole personal estate might not prove more than sufficient to pay all the legacies; in which case the executor could have nothing. For which reason the testator might be unwilling to leave him to the chance of the surplus, but would secure something to him by*

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the Resi-
dum.

a particular legacy, and then in case of a deficiency he would abate only in proportion. However this point has been now long established, and is not to be controverted by such an argument. And I remember in the case of *Farrington v. Keetly*, Lord Macclesfield said, that he had consulted Mr. Vernon, who had then left the bar, who told him that he did not then trouble himself with taking notes of modern resolutions upon this point; because he looked upon it to be as plain and settled as that an estate to a man in fee should descend to a man and his heirs. Other cases have been determined in favour of the next of kin, upon the circumstances of the proximity of blood: but these determinations have been over-ruled in later cases, because that reasoning might produce great uncertainty. For if that distinction were to be admitted, then a distinction would arise as to those of a nearer degree of kindred and those who are more remote; and if the testator's estate was to depend on such circumstances, it would bear a very uncertain construction; though in the case of *Ball v. Smith*, there was a distinction in favour of a wife. I mention these things to lay them out of the case: for the ground of my determination is, that the legacy is given to a *feme covert* of stock in trade, in trust for her separate use, and under very particular circumstances. The intent of the testatrix is manifest. She gives the particular legacy in trust for the wife, who was her daughter; because otherwise it would have passed to the husband as his absolute property; for though upon her death it would have passed from her to the administrator *de bonis non*, yet the husband would have it in point of property and interest, as he would be entitled to it after the debts and legacies were paid out of the assets: which reason does not extend to the residuum; for that it does not appear but she intended the husband should have that as well as her daughter; and no implication can arise upon a will but by a necessary construction; if so, the testatrix had no occasion to make an express devise of that in trust, as she did of the other. It was said in the argument of this cause, that a particular legacy given in trust for an executor, will have the same effect in point of law, and bar him of the residuum, as much as if the legal interest of the legacy were given him. And that is certainly true, because it implies nothing which makes any difference between such a devise in trust and an absolute one; but, as I said before, here was a particular reason why this legacy was expressly given in trust, for the husband could not have been otherwise excluded; and it is that the trustee may enter into partnership with the son, but he is to improve the stock for the separate use and benefit of the wife, which prevents the common implication that the residuum should not pass. Therefore I think there is no ground in this case to make the exe-

cutrix account for the surplus; and as to that the bill must be dismissed."

Southcot v. Watson, June 9, 1745(s). General Pulteney by his will gives in the first part of it, to Mrs. Watson, an annuity of 400*l.*; and in the last clause gives her all his household goods and furniture (three pictures excepted), and all his plate, linen, watches, jewels, and clothes whatsoever, and declared her sole executrix. The bill was brought for an account of such part of the personal estate as is undisposed of, and for a distribution. And by the Lord Chancellor Hardwicke: The bequest of the specific things to Mrs. Watson excludes her from the residue.

Bequest of Specific Things excludes a Person from the Residue.

Blinkhorn v. Feast, Oct. 24, 1750. The testator gave a pecuniary legacy to A., and another of a different value to B., both infants, and made them his executors. The question was, as to the residue of his personal estate, whether it should result to the next of kin, or go to his executors. By the Lord Chancellor Hardwicke: *Though the law casts the whole personal estate upon the executor, yet as a will is to be construed chiefly according to the intention of the testator, if it appear manifestly his design that the executor shall not have it, it shall be distributed by this court.* As where a specific legacy is given to an executor, he shall not have the residue; as it would be absurd to think that the testator, after he had given him what he thought convenient, should also intend to give him the whole residue, which would include the particular legacy. Yet in many cases this construction may be improper; and therefore the rule of law has been suffered to take place. As in the case of *Griffith v. Rogers*, where the executrix had a specific legacy of ten books. And in the case of *Jones v. Westcomb* (t), where a man, possessed of a long term, devised it to his wife for life, and after her death to the child she was then *enceinte* with, and made her executrix. For in this case it was necessary to devise the term to her specifically, for the sake of the limitation to the child. In the present case, not to mention that it is improbable the testator would have made these persons, who are infants, his executors, merely for the purpose of distributing his personal estate, without any benefit to themselves; it was very proper he should give them these legacies, though he might intend they should after have the residue; for they do not take the legacies, as they will the residue; for this they are entitled to jointly and equally, and the survivor will take the whole. But the legacies are unequal in value, and their interest in them different and separate. And it cannot be inferred that the residue includes the particular legacies; for as they are bequeathed, the legatees are entitled to them in severalty, and with different interests; whereas, if he had not separated them, they would have devolved jointly, and

(s) 3 Atk. 226,

(t) Prec. Ch. 316.

Executor
when entitled
to Residuum.

otherwise than he intended they should. And he decreed the residue to the executors.

Finally, in the case of *Lawson v. Lawson*, Apr. 19, 1777 (u), upon an appeal from the chancery to the House of Lords, it was determined, that unless in cases where the contrary is inconsistent and incompatible with the apparent intention of the testator, or there is violent presumption of fraud, the residue of the personal estate, after payment of debts and legacies, shall go to the executor.

In this case, the wife was executrix, and had property specifically given to her, which was hers before marriage. And the authority was cited in *Martin v. Rebow* (x), to prove that a wife, having a *specific legacy* bequeathed to her, might take the residue, although any other executor, having a *pecuniary legacy*, could not. But per Lord Thurlow, C.: The case of a wife may make a circumstance in evidence, but it cannot make a rule of law. The rule (of *Foster v. Munt*) is laid down, and has been acted upon for years past, that where a testator gives the executor a legacy, he pays him for his trouble, and turns him, as to the residue, into a trustee. And here the wife, who was executrix, having a real estate bequeathed to her, with a house in town, plate, &c., but no pecuniary legacy, an account was decreed to be taken of the residue, to be distributed according to the statute (y).

In *White v. Evans* (z), one executor being by a legacy for his care clearly a trustee of the residue for the next of kin, the other was held to be a trustee also. And in *Urquhart v. King* (a), where no legacies were given to the executors, they were under the circumstances held to be trustees of the residue for the next of kin. But executors are *primâ facie* entitled to the residue undisposed of: and it requires *strong* and *violent*, though not *irresistible*, presumption, to make them trustees (b).

11 Geo. 4,
& 1 Will. 4,
c. 40.

After 1st
Sept. 1830,
Executors
deemed to be
Trustees for
Persons en-
titled to any
Residue un-
der the Sta-
tute of Dis-
tributions,
unless other-
wise directed
by Will.

Not to affect
Rights of
Executors
where no
Person en-
titled to the
Residue.

[These cases were before the passing of the 11 Geo. 4, and 1 Will. 4, c. 40. This act enacted as follows:

[Sect. 1. "That when any person shall die, after the first day of September next after the passing of this act, having by his or her will, or any codicil or codicils thereto, appointed any person or persons to be his or her executor or executors, such executor or executors shall be deemed by courts of equity to be a trustee or trustees for the person or persons (if any) who would be entitled to the estate under the statute of distributions, in respect of any residue not expressly disposed of, unless it shall appear by the will, or any codicil thereto, the person or persons so appointed executor or executors was or were intended to take such residue beneficially."

[Sect. 2. "That nothing herein contained shall affect or prejudice any right to which any executor, if this act had not been passed, would have been entitled, in cases where there is not any person who

(u) 7 Bro. P. C. 511.

(x) 1 Bro. C. C. 154.

(y) [See V. Williams on Ex. and Ad. vol. i. p. 163.]

(z) 4 Ves. 21.

(a) 7 Ves. 225.

(b) *Pratt v. Sladden*, 14 Ves. 193.

would be entitled to the testator's estate under the statute of distributions, in respect of any residue not expressly disposed of."

[Sect. 3. "That nothing herein contained shall extend to that part of the united kingdom called Scotland."

This Act does not extend to Scotland.

[It will be seen that the rights of the crown to the un-bequeathed property of a *bastard* are not reserved by the second section of this act; and it should seem, therefore, that the executor nominated in the will of a *bastard* would still be entitled to the undisposed residuum in the will of such a person.—ED.]

Bastard.

13. Revocation of Wills.

By the statute of the 29 Car. 2, c. 3, s. 6, "No devise in writing, of lands, tenements or hereditaments, or any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing or obliterating the same by the testator himself, or in his presence and by his directions and consent; but all devises and bequests of lands and tenements shall remain and continue in force, until the same be burnt, cancelled, torn or obliterated by the testator or by his directions in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses declaring the same.

Revocation of Wills.

Sect. 22. "And no will in writing concerning any goods or chattels or personal estate shall be repealed, nor shall any clause, devise or bequest therein be altered or changed, by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least."

[Before the passing of this statute, a will required to be in writing by 34 Hen. 8, c. 5, might be revoked by parol (c): for it was held not to follow that what was essential to the valid execution of an instrument should also be essential to its revocation.

[The ecclesiastical, no less than the temporal courts, are bound by the statute of frauds, as will be seen in the cases recited below.—ED.]

Ex parte Hellier, April 30, 1754(d). The question before Sir George Lee, as judge of the Prerogative Court, was, whether the execution of a second will is a revocation of the first, though the second is afterwards cancelled; and whether such cancelling sets up the first will again? He gave sentence that it

(c) [*Cranvel v. Sanders*, Cro. Jac. 497; *Ex parte Earl of Ilchester*, 7 Ves. 348; cases referred to in *Richardson v. Barry*, 3 Hagg. 252.] (d) 3 Atk. 798.

Revocation of
Wills.

was a revocation, and that the cancelling the second did not set up the first (e).

[And in *Wilson v. Wilson* (f), Sir J. Nicholl said, that “where a later will has been destroyed and a former will left uncanceled, it has been a point much controverted, whether the former will revives or not: it is a question of intention, and the intention must be collected from all the circumstances of the case. In the ecclesiastical court, the *prima facie* of presumption seems to be against the revival.”

[Questions of revocation are all, to some extent, questions of intention: hence testamentary instruments (regularly executed ones in particular) are *hardly* to be deemed revoked, by mere inference and implication, under *any* circumstances; but are certainly not to be, under circumstances tending to show that the testator’s *intention* was not to revoke them (g).

[The destruction of a latter will revives a former will nearly of the same import; the motive on which the variation was made having ceased to operate; and reconciliation to, and declarations in favour of, the universal legatee, under the former will, just previous to death, being shown; such revival being always a question of intention, and admitting the introduction of parol evidence (h).

[It should be observed, that the presumption is always strongly adverse to an unfinished instrument, materially altering a will deliberately framed and duly executed. Such a paper requires the fullest proof of capacity, volition, and final intention (i).—ED.]

Eggleston v. Speke, M., 1689 (k). Lady Speke by will gave her lands to one and his heirs. Afterwards she made another will, by which also she gave her lands to the same man and his heirs; but this last will was held void to pass lands, because the witnesses did not subscribe it in her presence. It was objected, that this was good, however, as a revocation of the former will. But by the court: It cannot operate as a revocation, because contrary to her apparent intent. To revoke by a *will*, within the words of the statute, must be by a will attested by three witnesses, and subscribed by them in the presence of the testatrix, which this will was not.

Onyons v. Tyrer, H., 1716 (l). A man makes his will, duly executed and attested, and at the same time in like manner executes a duplicate thereof. Some time after, having a mind to change one of his trustees, he orders his will to be written over again, without any variation whatsoever from the first,

(e) [Compare this case with *Glazier v. Glazier*, post, 235. See Lee’s R. 472, 514, and notes of Dr. Phillimore the Editor.—ED.]

(f) [3 Phill. R. 543.]

(g) [*Smith and Blake v. Cunningham*, 1 Add. R. 488.]

(h) [*Lady Kirkcudbright v. Lord Kirkcudbright*, 1 Hagg. R. 325.]

(i) [*Blewitt v. Blewitt*, 4 Hagg. 410; *Gillow v. Browne*, ibid. 192.]

(k) Carth. 81.

(l) 1 Abr. Eq. Cas. 408.

save only in the name of that trustee. And when it was so written over, he executes it in the presence of three witnesses, and the three witnesses subscribed their names, but not in his presence. After this, the testator cancels the duplicate, by tearing off the seal; and then dies. The question was, whether this second will, not being good as a will to pass lands, should yet be a revocation of the first; and if it should not, whether the cancelling the other should be a revocation thereof within this statute. And it was decreed, that neither the making the second, nor the cancelling of the first, was a revocation thereof, though in the second there was an express clause that he did thereby revoke all former and other wills: wherein the lord chancellor took this distinction, that the second was not intended barely a revocation of the first, so as to signify his intention of dying intestate; but it was intended as an effectual will to pass the lands to the persons, and in the manner thereby devised; and therefore if it was not good as a will to that purpose, it was no revocation of the first.

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Ellis v. Smith, E., 1754 (m). A man makes a will, and by it revokes a former will. The only proof of the execution of this latter will was by three witnesses, who did not see him sign or seal it, but upon their being called in, he acknowledged it to be his handwriting and seal, pointing with his finger to the will; upon which they attested it. Two questions arose: 1. Whether, considering this as an original will, it was well executed. 2. If it is, whether it is well executed as a revocation, because by the statute it ought for this purpose to be *signed in presence of the witnesses*. By the Lord Chancellor Hardwicke: As to the former question, if this had been *res integra*, it would have been a matter of doubt with me; but it is *res adjudicata*, and must now be taken as decisive. All the cases where an attestation by three witnesses at different times is held good, are authorities in point; for they must all be founded upon the proof of this very fact, the acknowledgment of the testator that it was his handwriting. It could not be a different execution before each witness, for then there would be three executions, and the act would not be complied with, as it requires three witnesses to one execution: and as to the *sealing*—putting anything on the seal, as a finger, *animo signandi*, is good enough. But he seemed to think that sealing was not *signing* within the statute, contrary to the *obiter* opinion in *Lemain v. Stanley*. As to the second, he said that the words *signed in the presence of three witnesses*, refer to the next preceding words (*other writing*) only, and not to a will or codicil; and so it was determined in the case of *Hoyle v. Clarke* (n).

Glazier v. Glazier, H., 10 Geo. 3, [commonly called *Goodright v. Glazier* (o).—ED.] This cause had been tried at the

(m) 3 Lev. 1.

(n) 3 Mod. 218.

(o) Burr. Mansf. 2512.

assizes, and a verdict given for the plaintiff, the heir at law, against the defendant, who was devisee in two wills. It now came before the court upon a motion on the part of the defendant for a new trial; which was opposed by the counsel for the plaintiff, who argued that both wills were revoked, and consequently their client took as heir at law. The question turned upon the revocation of the first will, by making the second. The first will was not cancelled. The second was cancelled by the testator himself. Both wills were in the testator's custody at the time of his death. The counsel for the plaintiff, the heir at law, argued that the second will was a complete instrument at the time when it was executed; that it clearly proved the testator's intention of revoking the former; and that the execution of it was as much a revocation of the former as if he had thrown the former into the fire; that the preservation of it was merely accidental, and of no consequence; that it had been already totally extinguished, so that it could never revive; that as it had never been republished, it remained a mere nullity; and that no subsequent event could hinder the execution of the second will from operating as a revocation of the former: the second will was therefore the testator's only subsisting will, so long as it remained uncanceled; and when he thought fit to cancel and destroy it, it is manifest that he meant to die intestate, and that his heir at law should take. If a woman makes a will, and then marries, her prior will is thereby revoked, and shall remain so, although she should immediately become a widow. They cited a case of *Ashburnham v. Bradshaw*, and also the case *Ex parte Hellier (p)*, where Sir George Lee gave sentence, that the execution of a second will is a revocation of a first, though the second be afterwards cancelled; and that the cancelling the second did not set up the first, which they said was the same point, only that it was personal property. And this sentence was affirmed by the Delegates. They denied the two cases of *Eggleston v. Speke* and of *Onyons v. Tyrer* to be like the present case. The former is only, that a second will shall not revoke the first, if the second is not good in law, but void. The latter is, that a second will, devising lands to the same person, and revoking all former wills, and this second will subscribed by three persons, but not in the testator's presence, shall not revoke the former will, so as to let in the heir at law. The counsel on the other side beginning to speak were stopped by Lord Mansfield, who said the case was so plain as to render it unnecessary to proceed. He observed, with regard to the case *Ex parte Hellier (q)*, that Mr. Atkyns only reports what passed in Chancery. There might be other circumstances appearing to the Ecclesiastical Court which might amount to a revocation of a

(p) 3 Atk, 798.

(q) [See 1 Lee's Rep. 472, 514.]

will of personal estate. Here the testator has by both wills devised the lands in question to the defendant. His cancelling the second is a declaration that he doth not intend that to stand as his will. Doth not that speak, that his first will shall stand? If he had intended to revoke the first will when he made the second, it must have operated as a declaration that the defendant should not take. But that could not be his intention, because he devises to the defendant by both. A will is ambulatory till the death of the testator. If the defendant lets it stand till he dies, it is his will. If he does not suffer it to do so, it is not his will. Here he had two. He has cancelled the second; it has no effect, no operation; it is as no will at all, being cancelled before his death. But the former, which was never cancelled, stands as his will.

In the case of *Rolfe v. Harwood* H., 14 Geo. 3 (r). In the Common Pleas. The jury found that John Lacy, esquire, had made two wills; one in 1748, and the other in 1756; and that the disposition made in the latter was different from that in the former, but in what particulars the jurors did not know: and they further added, that they do not find that the testator cancelled or that the defendant (the devisee under the former will) destroyed the latter will, but what is become thereof they are ignorant. De Grey, Chief Justice, Gould and Nares, Justices, were of opinion that this was a sufficient revocation of the former will to let in the title of the heir at law, it being proved to be the last will of the testator, and containing a different disposition from the former will, although in what particulars it did not appear. Blackstone, Justice, was of opinion, that this was not a sufficient revocation, because it did not specifically appear that the latter revoked the former, and nothing shall be presumed on a special verdict; it is setting up a second will in the dark, which neither the court nor jury ever saw, and of the contents whereof they are wholly ignorant. Upon this, a writ of error was brought in the King's Bench; and there the court unanimously reversed the judgment of the Common Pleas. Afterwards, a writ of error being brought in Parliament, the House of Lords, upon hearing the opinions of the Barons of the Exchequer in favour of the judgment of the Court of King's Bench, affirmed the judgment of that court, that this was not a sufficient revocation.

Mole v. Thomas, M., 16 Geo. 3 (s). William Palin, having several times declared himself discontented with his will, being one day in bed near the fire, ordered Mary Wilson, who attended him, to fetch his will, which she did, and delivered it to him, it being then whole, only somewhat creased. He opened it, looked at it, then gave it something of a rip with his hands, and so tore it as almost to tear a bit off, then rumbled it

(r) 3 Wils. 497; Black. Rep. 937. (s) Black. Rep. 1043.

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together and threw it on the fire, but it fell off; however, it must soon have been burned, had not Mary Wilson taken it up, and put it in her pocket. Palin did not see her take it up, but seemed to have some suspicion of it, as he asked her what she was about, to which she made little or no answer. He at several times afterwards said, that was not and should not be his will, and bade her destroy it. She said at first, "So I will, when you have made another." But afterwards, upon his repeated inquiries, she told him she had destroyed it, though in fact it was never destroyed. She asked him, when his will was burned, whom his estate would go to? He answered, to his sister and her children. He afterwards writ to his brother John Mills, telling him he had destroyed his will, and would make no other till he had seen him, and desired him to come; for, says he, if I die intestate it will cause uneasiness. However, he died without making any other will. The jury thought this a sufficient revocation, and gave a verdict for the heir at law. It was moved for a new trial. But the court were of opinion that this was a sufficient revocation; and said that a revocation under the statute may be effected either by framing a new will amounting to a revocation of the former, or by some act done to the instrument itself, as burning, tearing, cancelling, or obliteration, by the testator, or in his presence and by his direction: any of these, joined with a declared intent, is a sufficient revocation within the statute.

Even a latter will, though in other respects void, yet may be a sufficient revocation of the former. As where there was a devise of lands to one, and afterwards the deviser by a will duly executed and attested devised the lands to another who was a papist, it was decreed that both the devises were void; for though the latter was void as a will, yet it was good as a revocation (*t*).

So a deed intended to operate as an appointment to uses, but not sufficient for that purpose, was held to revoke a will, the party appearing to have had that intention (*u*).

Will of Real
not revoked
by Will of
Personal
Estate.

But a will which will pass personal estate is not a sufficient revocation of a former will whereby a real estate is devised (*x*).

And although the statute says, that no will in writing concerning personal estates shall be repealed by word of mouth only, except the words be put into writing, and read to and allowed by the testator, and proved to be so done by three witnesses; yet where a man by will in writing devised the residue of his personal estate to his wife, and she dying, he afterwards by a nuncupative codicil bequeathed to another all that he had given to his wife, this was resolved to be good: for by the death of the wife, the devise of the residue was totally

(*t*) 2 Abr. Eq. Cas. 771.

124, 310.

(*u*) *Shove v. Pincke*, 5 T. Rep.(*x*) Comyns, 451.

void; and the codicil was no alteration of the former will, but a new will for the residue (*y*).

Also, the statute hath not taken away revocations of wills by *act of law*; as if the testator afterwards make a feoffment, or do any other act inconsistent with the will: but such revocation remains as before the statute (*z*).

Implied Re-
vocation of a
Will.

So if a testator suffer a recovery of, or sell the lands devised (*a*); and the same of an equitable estate (*b*).

If a man devises lands to one and his heirs, and afterwards mortgages the same lands to another for years or in fee, though a mortgage in fee is a total revocation at law, yet in equity it shall be a revocation *pro tanto* only (*c*).

And the reason is, because a mortgage is not considered as a conveyance of the estate, but only as a charge upon it; being merely a security, and in the consideration of equity carries only a chattel interest, the creditor gains nothing real, it affords no dower, and goes to executors (*d*).

But if lands be devised to one in fee, and afterwards mortgaged to the same devisee, this is a revocation *in toto*, being inconsistent with the devise: but if the mortgage had been to a stranger, it had been a revocation *quoad* the mortgage only (*e*).

If a man seised in fee, devises it to one in fee or for life, and afterwards makes a lease to another for years; this, even at law, shall not be a revocation but during the years (*f*).

So if a husband possessed for forty years, devises it to his wife, and after leases the land to another for twenty years, and dies; this lease is not any revocation of the whole estate, but only during the twenty years, and the wife shall have the residue by the devise (*g*).

But where a man seised of a lease for lives, devised it, and afterwards surrendered the old lease, and took a new one to him and his heirs for three lives; it was decreed, that this renewal of the lease was a revocation of the will as to this particular. For by the surrender of the old lease, the testator had put all out of him, had divested himself of the whole interest; so that there being nothing left for the devise to work upon, the will must fall, and the new purchase, being of a freehold descendible, could not pass by a will made before such purchase (*h*).

Sir Thomas Abney v. Miller, June 10, 1743 (*i*). The testator by his will devised all his college leases which he then

(*y*) 1 Abr. Cas. Eq. 408.

(*z*) Carth. 81; 3 Mod. Rep. 206.

(*a*) *Marwood v. Turner*, 1 P.Wms. 165; *Arnold v. Arnold*, 1 Bro. 401.

(*b*) *Freeman v. Freeman*, cor. Lord Hardwicke, C., 1 Wils. 308.

(*c*) 1 Abr. Eq. Cas. 410.

(*d*) *Sparrow v. Hardcastle*, May 6,

1754, 3 Atk. 798.

(*e*) Prec. Cha. 514.

(*f*) 1 Rolle's Abr. 616.

(*g*) Ibid.

(*h*) *Marwood v. Turner*, 3 P.Wms. 166, 170.

(*i*) 2 Atk. 593.

Implied Re-
vocation.

held of Magdalen College to Mrs. Burton his mother, to be sold by her immediately after his decease, and ordered the money arising by such sale to be distributed according to the directions of the said will. Some years after making the will, he surrendered the college leases devised by it, and accepted two new leases of the premises, but one of them was not sealed with the college seal till after the death of the testator. Lord Hardwicke decreed, that the lease actually renewed after the will made, was a revocation of the devise (*k*), but otherwise as to the lease not perfected for want of the college seal.

But where the testator devised *all and singular his leasehold estate*, and afterwards renewed a lease; it was held by Lord Hardwicke clearly, that this leasehold estate passed by the will: for that this is not a specific legacy, but only an enumeration of the several particulars of the personal estate, but yet is a general devise of the whole (*l*).

Though a covenant or *articles* do not at law revoke a will, yet if entered into for a valuable consideration, amounting in equity to a conveyance, they must consequently be an equitable revocation of a will, or of any writing in nature thereof (*m*).

[The difference between the decisions at common and ecclesiastical law seem to be, that the former hold revocation to be grounded on a *rule of law*, the latter on *intention* (*n*).—ED.]

Marriage.

A woman's *marriage* is alone a revocation of her will (*o*). [And with respect to a man, the doctrine of the Ecclesiastical Court has been, that marriage and the birth of a child are a presumptive revocation of a will (*p*); and they have been held a presumptive revocation of the will of a widower made prior to a second marriage; and the death of the child does not alter the presumption (*q*). That presumption, however, (the strength of which varies according to circumstances) may be rebutted by evidence (strong in proportion) to show that the testator *meant* it to operate, notwithstanding his marriage, and the birth of issue; but such evidence, to be effectual, must satisfy the court as to this, *unequivocally*.

[But even marriage and birth of issue do not constitute an absolute, but a presumptive, revocation of a prior will,—the law presuming an intention to revoke, arising from a change of condition and new obligations; but if such change of condition and new obligations are provided for, and the intention to revoke cannot be presumed, the revocation does not take place; therefore a will in favour of the issue of a former marriage is not revoked by a subsequent marriage and birth of

(*k*) *S. P. Hone v. Medcraft*, 1 Bro. 160.

(*l*) 3 Atk. 199.

(*m*) 2 P. Wms. 624.

(*n*) [*Marston v. Doe d. Fox*, 8 A. & E. 14; *S. C.* 2 Nev. & Per. 504.]

(*o*) 2 P. Wms. 624; *Forse v. Hembling*, 4 Rep. 60 b.

(*p*) [*Braddyll v. Jehen*, 2 Lee's R. 193.]

(*q*) [*Emerson v. Boville*, 1 Phill. 342; *Holloway v. Clarke*, *ib.* 339.]

issue, such marriage and issue having been provided for by settlement (r).

Marriage.

[A second marriage and the birth of issue is not a revocation of a will made in favour of the children of a former marriage, and an illegitimate child, where the second wife has some real property settled on her and her issue under her father's will, and where the deceased had possession and full knowledge of the existence of such will (s).—ED.]

A man made a will, and appointed one (who was no relation) to be his executor. He afterwards went abroad, where he became a governor of one of the plantations, and sent over for an English woman of his acquaintance, whom he married, and had children by; and died, without an actual revocation of his will. Yet it was determined, that this *total alteration of his circumstances* was an implied revocation (t).

So in the case of *Lugg v. Lugg*, M., 8 W. 3 (u), before the Delegates, one being single made his will, and devised all his personal estate. Afterwards he married, and had several children, and died without other will or disposition. It was ruled, that there being such an alteration in his estate and circumstances so different at the time of his death from what they were when he made the will, here was room and presumptive evidence to believe a revocation, and that the testator continued not of the same mind.

And in the case of *Brown v. Thompson*, T., 1702 (x), the lord keeper was of opinion, that alteration of circumstances may be a revocation of a will of *lands*, as well as of a personal estate, notwithstanding the statute, which doth not extend to an implied revocation.

And accordingly, marriage and the birth of a child has been adjudged a revocation of a will of *lands*, in *Christopher v. Christopher* (y), and *Sprange v. Stone* (z), though the child were born after the father's death (a). But as marriage and the birth of a child, when taken together, only furnish ground on which to presume an alteration of the testator's mind, such implied revocation may be rebutted by evidence, either written or parol, which proves a republication (b).

Ex parte the Earl of Ilchester (c). A second marriage, and the birth of children, the wife and children being provided for by settlement, and there being children by the former marriage, held to be a case of exception from the rule, that marriage and the birth of a child revoke a will.

(r) [*Talbot and others* (by their Guardian) v. *Talbot*, 1 Hagg. R. 705; and see 2 Hagg. R. 561.]

(s) [*Johnson v. Wells*, 2 Hagg. R. 561.]

(t) *Eyre v. Eyre*, 1 P. Wms. 304.

(u) 2 Salk. 592; Ld. Raym. 441.

(x) 1 Abr. Cas. Eq. 413.

(y) 4 Burr. 2182.

(z) Amb. 721.

(a) *Doe v. Lancashire*, 5 T. R. 49.

(b) *Brady v. Cubitt*, 1 Doug. R. 31.

(c) 7 Ves. 348.

Hinckley v. Simmons (d). Two unmarried sisters made similar wills, in favour of each other, bearing the same date, and appointing the same executors. The marriage of one of them was held not to revoke the will of the other (e).

Intention
must be re-
duced into
writing.

[The requisition of the statute is satisfied by the intention to revoke being reduced into writing in the lifetime, and by the direction, of the testator.

[Where a letter was written to a person who had the custody of the will by the testator, desiring it to be destroyed, it was held a sufficient revocation, though the will was not destroyed (f).

[But an executed will has been held not to be revoked by an unexecuted schedule of later date (g); and an incomplete will cannot operate as a revocation of a subsisting will (h).

[A latter will, disposing of realty and personalty, containing a clause of revocation, and uncanceled, is not revoked, and a former will revived, by reading over the former will and by parol declarations, (unaccompanied by acts), that it was his last will,—the former will being found carefully deposited and locked up in a drawer, and the latter will, though in the same drawer, lying among useless papers, and all the devises and legacies lapsed (i).

Presumptive
Proof of.

[If a testamentary paper be cancelled, the law infers the revocation of it, unless it can be clearly shown—first, that it once existed as a *finished* will; secondly, that the testator adhered to it throughout in mind and intention, notwithstanding its cancellation (k).

[A will being executed in duplicate, one part of which was proved to have been in, and was never traced out of, the deceased's possession, and was not found at his death, the *prima facie* presumptions are—first, that the testator destroyed the part in his own possession; and second (if the first be not repelled), that he intended thereby to revoke the duplicate not in his possession: the deceased pronounced dead intestate (l).

[These presumptions may be rebutted by a strong combination of circumstances leading to a moral conviction, or by direct positive evidence (m).

Revocation
by Codicil.

[There are numerous cases which have decided, according to the particular circumstances attending each, the question

(d) 4 Ves. 160.

(e) [See c. vii. of Jarman on Wills, and c. iii. p. 90, vol. 1 of V. Williams on Ex. & Ad. on this subject.]

(f) [Walcott v. Ouchterlony, 1 Curteis, 580. The revocation of a will established, Cox v. Thompson, 1 Lee's R. 529; Kirkcudbright v. Kirkcudbright, 1 Hagg. R. 325.]

(g) [Reynolds (Administrator of White) v. White, 2 Lee's R. 214.]

(h) [Reeves v. Glover and others, 2 Lee's R. 359.]

(i) [Daniel v. Nockolds, 3 Hagg. R. 777.]

(k) [Lord John Thynne v. Stanhope, 1 Add. R. 52.]

(l) [Colvin v. Fraser and others, 2 Hagg. R. 266.]

(m) [Ibid.]

how far a codicil affects the dispositions of a will or antecedent codicil. It is a settled rule with the courts whose province it is to adjudicate upon such questions never to disturb the dispositions of the will further than is absolutely necessary for the purpose of giving effect to the codicil (n).

[The new statute of wills provides that no will shall be revoked except by another will or codicil, or “by burning, tearing, or otherwise destroying the same by the testator (o).”]

[14. Law of Domicil.

[A will of *fixed or immoveable* property is governed by the *lex loci rei sitæ*. A will of *personalty* is governed by the *lex domicilii*. These maxims of international law (p) may now be considered as incorporated into British jurisprudence. The latter proposition was firmly established in the case of *Stanley v. Bernes* (q), in which the High Court of Delegates reversed the judgment of Sir John Nicholl. The substance of their decision is as follows: that a natural born British subject may acquire a foreign domicil, and that even the *animus revertendi* and general treatment as a British subject may not suffice to preserve his original domicil, *and if domiciled abroad he must conform in his testamentary acts with the formalities required by the lex domicilii* (r). The ecclesiastical courts therefore grant probate of an instrument ascertained to be testamentary according to the law of the foreign domicil, though invalid as an English will. And where they have granted probate in error of the domicil, the executors will be bound to distribute according to the law of the domicil (s).

Realty and
Personalty.

[15. Wills of Seamen and Marines.

[By stat. 11 Geo. 4 & 1 Will. 4, c. 20, the stat. 55 Geo. 3,

(n) [See *Duffield v. Duffield*, 3 Bligh, N. S. 261; *Beckett v. Harden*, 4 Mau. & Selw. 1; *Lushington v. Boldero*, Geo. Coop. 216; and see Mr. Jarman's chapter on Revocation of Wills, vol. i. p. 160.]

(o) [*Vide infra*, sect. 20 of 1 Vict. c. 20.]

(p) [“*Mobilia vero ex lege domicilii ipsius defuncti vel quia semper domino præsentia esse finguntur vel ex comitate passim usu inter gentes receptâ.*”—Voet. ad Pand. l. 38, t. 17, s. 24, p. 396. See also Bynkershoek, Quæst. Jur. Priv. l. 1, c. 16; Sir L. Jenkins, vol. ii. pp. 663, 669, as to the property of Henrietta Maria, widow of Charles I., who died intestate in France.—Ed.]

(q) [3 Hagg. 372.]

(r) [*In re De Vera Maraver*, 1 Hagg. 498; *Moore v. Budd*, 4 Hagg. 346. As to India, *In re Read*, 1 Hagg. 474; *Larpent v. Sindry*, 1 Hagg. 382. As to Scotland, *Hare and others v. Nasmyth*, 2 Add. 25.]

(s) [*Thornton v. Casling*, 8 Sim. 310; and generally on the law of domicil, *Bruce v. Bruce*, 2 Bos. & Pull. 229, Lord Thurlow; *Somerville v. Somerville*, 5 Ves. 750, Sir P. Arden; *Sill v. Worswick*, 1 H. Bl. 690 (Lord Loughborough); and the cases collected by Mr. Story in the 9th chapter of his Conflict of Laws, and in the arguments of counsel and note to *Stanley v. Bernes*, 3 Hagg. 373—465; and Mr. Jarman's 1st chapter in his Treatise on Wills.]

c. 60, is repealed, which had absorbed all former acts on this subject.

[By sect. 48 it is enacted—

11 Geo. 4
& 1 Will. 4,
c. 20.

Mode of exe-
cuting Let-
ters of At-
torney and
Wills.

["That no will made by any petty officer or seaman, non-commissioned officer of marines or marine, before his entry into his majesty's service, shall be valid to pass any wages, prize money, or other monies payable in respect of services in his majesty's navy; and that no letter of attorney made by any such person who shall be or shall have been in the said service, or by the widow, next of kin, executors, or administrators of any such person, shall be valid or sufficient to entitle any person to receive any wages, prize money, or other allowance of money of any kind for the service of any such person in his majesty's navy, unless such letter of attorney shall be therein expressed to be revocable, and that no such letter of attorney shall be valid or sufficient to entitle any person to receive any such wages or other monies; nor shall any will made or to be made by any petty officer or seaman, non-commissioned officer of marines or marine, who shall be or shall have been in the naval service of his majesty, be valid or sufficient to pass any such wages, prize money, or other monies, unless such letter of attorney or will respectively shall contain the name of the ship to which the person executing the same belonged at the time, or to which he last belonged, nor unless such letter of attorney, if made by an executor or administrator, shall contain the name of the ship to which his or her testator or intestate last belonged, and also in every case a full description of the degree of relationship or residence of the person or person to whom or in whose favour, either as attorney or attornies, executor or executors, the same shall be made, and also the day of the month and year and the name of the place when and where the same shall have been executed, nor shall any such letter of attorney or will be valid for the purposes aforesaid unless the same respectively shall, in the several cases hereinafter specified, be executed and attested in the manner hereinafter mentioned; (that is to say,) in case any such letter of attorney or will shall be made by any such petty officer or seaman, non-commissioned officer of marines or marine, while belonging to and on board of any ship of his majesty as part of her complement, or borne on the books thereof as a supernumerary or as an invalid, or for victuals only, the same shall be executed in the presence of and be attested by the captain, or (in his absence) by the commanding officer for the time being, and who in that case shall state at the foot of the attestation the absence of the captain at the time, and the occasion thereof; and in case of the inability of the captain, by reason of wounds or sickness, to attest any such will or letter of attorney, then the same shall be executed in the presence of and be attested by the officer next in command, who shall state at the foot of such attestation the inability of the captain to attest the same and the cause thereof; and if made in any of his majesty's hospital ships, or in any naval or other hospital, or at any sick quarters either at home or abroad, the same shall be executed in the presence of and be attested by the governor, physician, surgeon, assistant surgeon, agent, or chaplain of any such hospital or sick quarters, or by the commanding officer, agent, physician, surgeon, assistant surgeon, or chaplain for the time being of any such

11 Geo. 4 &
1 Will. 4, c. 20.

hospital ship, or by the physician, surgeon, assistant surgeon, agent, chaplain, or chief officer of any military or merchant hospital or other sick quarters, or one of them; and if made on board of any ship or vessel in the transport service, or in any other merchant ship or vessel, the same shall be executed in the presence of and be attested by some commission or warrant officer or chaplain in his majesty's navy, or some commission officer or chaplain belonging to his majesty's land forces or royal marines, or the governor, physician, surgeon, or agent of any hospital in his majesty's naval or military service, if any such shall be then on board, or by the master or first mate thereof; and if made after he shall have been discharged from his majesty's service, or if such letter of attorney be made by the executor or administrator of any such petty officer or seaman, non-commissioned officer of marines or marine, if the party making the same shall then reside in London or within the bills of mortality, the same shall be executed in the presence of and be attested by the inspector for the time being of seamen's wills and powers of attorney, or his assistant or clerk; or if the party making the same shall then reside at or within the distance of seven miles from any port or place where the wages of seamen in his majesty's service are paid, the same shall be executed in the presence of and be attested by one of the clerks of the treasurer of the navy resident at such port or place; or if the party making such letter of attorney or will shall then reside at any other place in Great Britain or Ireland, or in the Islands of Guernsey, Jersey, Alderney, Sark, or Man, the same shall be executed in the presence of and be attested by one of his majesty's justices of the peace, or by the minister or officiating minister or curate of the parish or place in which the same shall be executed; or if the party making the same shall then reside in any other part of his majesty's dominions, or in any colony, plantation, settlement, fort, factory, or any other foreign possession of his majesty, or any settlement within the charter of the East India Company, the same shall be executed in the presence of and be attested by some commission or warrant officer or chaplain of his majesty's navy, or commission officer of royal marines, or the commissioner of the navy, or naval store-keeper at one of his majesty's naval yards, or a minister of the Church of England or Scotland, or a magistrate or principal officer residing in any of such places respectively; or if the party making the same shall then reside at any place not within his majesty's dominions, or any of the places last mentioned, the same shall be executed in the presence of and be attested by the British consul or vice consul, or some officer having a public appointment or commission, civil, naval, or military, under his majesty's government, or by a magistrate or notary public of or near the place where such letter of attorney or will shall be executed; nor shall any will of any petty officer, seaman, non-commissioned officer of marines or marine, be deemed good or valid in law to any intent or purpose, which shall be contained, printed, or written in the same instrument, paper, or parchment with a power of attorney: Provided always, nevertheless, that if it shall appear to the satisfaction of the treasurer of his majesty's navy, in the case of any will or letter of attorney executed on board any of his majesty's ships, that in the attestation

11 Geo. 4 &
1 Will. 4, c. 20.

Exception as
to Wills made
by Prisoners
of War.

Wills, &c. to
be noted in
the Muster
Book.

Letters of
Attorney and
Wills to be
examined by
the Inspector.

thereof the captain's signature hath by accident or inadvertence been omitted, and that in all other respects the execution has been conformable to the provisions and to the intent and meaning of this act, it shall be lawful for the inspector of seamen's wills and powers to pass the same as valid and sufficient."

[Sect. 49. "Provided always, that every letter of attorney or will which hath been or which hereafter shall be made by any petty officer or seaman, non-commissioned officer of marines or marine, while any such person hath been or shall be a prisoner of war, shall be valid to all intents and purposes, provided it shall have been executed in the presence of and be attested by some commission officer of the army, navy, or royal marines, or by some warrant officer of his majesty's navy, or by a physician, surgeon, or assistant surgeon in the army or navy, agent to some naval hospital, or chaplain of the army or navy, or by any notary public; but so as not to invalidate or disturb any payment which hath been already made under any letter of administration, certificates, or otherwise, in consequence of the rejection of any such wills by the inspector of seamen's wills, for want of the due attestation thereof according to the directions of any former act of parliament."

[Sect. 50. "That all officers commanding ships shall, upon their monthly muster books or returns, distinguish which of the persons therein named have made any letter of attorney or will during that month, or other space of time from the preceding return, by inserting the date of such letter of attorney or will opposite the party's name, under the heads of 'letter of attorney' or 'will,' or both, as the case may require; and shall likewise transmit to the treasurer of the navy, at the time such returns are transmitted to the Navy Office, a list to the same effect of all such persons."

[Sect. 51. "That before any letter of attorney or will shall be attempted to be acted upon or put in force, the same shall be sent to the treasurer of the navy, at the Navy Pay Office, London, in order that it may be examined by the inspector of seamen's wills and letters of attorney, who, or his assistant, shall, on receipt thereof, duly register the same in a numerical and alphabetical manner in separate books to be kept for that purpose, specifying the date, the place where executed, the name and description of the party making the same, the names and additions of the persons described therein either as attornies or executors, and also of the witnesses attesting the same, and shall mark the same with the corresponding numbers in the ship's books; and the said inspector shall take due means to ascertain the authenticity of every such letter of attorney and will, and in case he shall have reason to suspect its authenticity, he shall give notice in writing to the attorney or executor, as the case may be, that the same is stopped, and the reason thereof, and shall also report the same to the treasurer of the navy, and shall enter his caveat against such letter of attorney or will, which shall prevent any money from being received thereon until the same shall be authenticated to the satisfaction of the said treasurer; but if there shall be no reason, upon such examination, to doubt its authenticity, the said inspector or his assistant shall sign his name thereto, and also put a stamp thereon in token of his approbation thereof, and, as to such letters of attorney, forthwith

send to the person therein named as attorney a check specifying the number of such letter of attorney, the name and description of the person granting the same, the name and addition of the person in whose favour the same is granted, the date and place when and where executed, and the names of the witnesses attesting the same, which check shall be a sufficient authority for the attorney to demand and receive payment of and to give acquittances for all such wages, pay, or other allowances of money to which the person granting the same was entitled for his service on board of any of his majesty's ships." 11 Geo. 4 &
1 Will. 4, c. 20.

[Sect. 52. "That no letter of attorney of any petty officer or seaman, non-commissioned officer of marines or marine, which shall not have been made or executed on board the ship to which the party shall have belonged, in the manner required by this act, shall be passed, stamped or allowed by the said inspector until a certificate shall have been produced to him, under the hand of the captain, specifying the period of the party's service on board under the command of such captain, and a description of his height, complexion, and age, unless reasonable cause shall be shown to and allowed by the said treasurer or inspector for dispensing with such certificate." No Letter of
Attorney to
be passed
until a Cer-
tificate be
produced.

[Sect. 53. "That the treasurer of the navy shall not be bound to pay regard to any power of attorney, or check of any power, under which any wages may be claimed as due to any officers, seamen, or marines, unless such power, or check of power, as the case may be, shall be actually produced at the time payment is claimed, and, in the case of an officer's pay, unless the power or a copy of the power be left with the proper officer of the said treasurer, accompanied with the usual certificates and papers; and in cases of the wages of a seaman or marine being claimed by any master under any indenture of apprenticeship, every such master shall, before he shall be entitled to receive the same, adduce satisfactory proof to the officer of the said treasurer that the indenture to be produced by him was in full force during the period for which such wages are claimed, and that the apprentice was, at the time of the execution of the indenture, under the age of eighteen years, and had not previously used the sea; but in case the indenture shall not be produced at the pay table when the wages shall be demanded, and such proof as aforesaid shall not be given, such wages shall be paid to the apprentice, and not to the master." As to Wages
claimed un-
der Powers of
Attorney and
Indentures.

[Sect. 54. "That all wages, pay, and other allowances payable for the service of any commission or warrant officer of his majesty's navy shall be paid to the officer himself, if present, at the pay table, or to his lawful attorney, upon the production of the usual certificates; but if he shall have assigned or sold his pay, the same shall be paid to the assignee, being duly authorized to receive the same; and if there shall be more assignments than one, they shall be satisfied according to priority of date; but the treasurer of the navy shall not pay regard to any assignment which shall not be presented at the pay table, accompanied by the usual certificates and papers, at the time the wages or pay are appointed to be paid, and unless a true copy of such assignment be left at the same time with the said treasurer, nor shall he be liable to pay under any as- Assignment
of Pay by
Commission
and Warrant
Officers.

11 Geo. 4 &
1 Will. 4, c. 20.

Mode by
which Exe-
cutors are to
obtain Pro-
bate.

signment conveying generally any annual or other periodical wages or allowance to grow due, but only under such assignments of wages, pay, or other allowances due, as shall be made to secure payment of any sum advanced by the assignee, which shall be truly set forth in such assignment, and for the amount of which, and no more, the wages, pay, and other allowances payable to the officer shall be liable."

[Sect. 55. "That when any petty officer or seaman, non-commissioned officer of marines or marine, who shall have belonged to any ship of his majesty, shall have died, leaving a will, no wages, prize money, or other allowance of money, shall be paid over to or recovered by his executor or executors except upon the probate of the will, to be obtained in the following manner; *videlicet*, after such will shall have been so transmitted, registered, and approved as hereinbefore directed, the inspector shall cause to be issued to the person named therein as executor a cheque in lieu thereof, containing directions to return the same, with his or her signature thereto, upon the testator's death, to the treasurer of his majesty's navy, which cheque shall be in the form heretofore used in such cases, or in such other form as the treasurer of the navy shall deem most expedient and conducive to the purposes of this act, and shall have the requisite certificates in blank subscribed thereto, to be filled up as hereinafter mentioned: and in the event of the testator's death, the minister or curate of the parish in which the party named as executor shall then reside shall, upon the application of the executor, examine him, and such two inhabitant householders of the parish as may be disposed to certify their personal knowledge of the holder of the cheque, touching his claim, and that they are satisfied of his being the person therein described as executor; and the said executor shall subscribe his name to the application, and the two householders their names to the certificate for that purpose subjoined to the cheque (the blanks therein being first filled up agreeable to truth), in the presence of the minister or curate, for which respective purposes the said executor and householders shall attend at such time and place as shall be appointed by the minister or curate, who being, upon examination of the several parties, satisfied with their answers, and that the person holding the cheque is the executor therein named, and that the two persons certifying as before required are inhabitant householders of the parish, and having seen the said parties sign the application and certificate respectively, (which he is hereby required to do), shall add thereto a description of the height, complexion, colour of eyes and hair, age, and any particular marks about the person of the party claiming as executor, and, after the several blanks shall have been filled up agreeable to truth, shall certify to the several particulars by subscribing his signature thereto; and the said executor shall, before signing the application, pay to the said minister or curate a fee of two shillings and sixpence for his trouble on the occasion, and the said application and certificates being in all things completed according to the directions therein and hereby given, the same shall be transmitted by the said minister or curate by the general post, addressed to the treasurer of the navy, London; and the said original will having been passed in the manner directed by this act, the

inspector shall note thereon the amount of the wages due to the deceased, as calculated on the search to be obtained from the navy office, and shall then forward such will to a proctor, in order to his obtaining probate thereof: and in case the executor shall not reside within the bills of mortality, the inspector shall also forward to such proctor a letter addressed to the minister, in the usual or other requisite form, for the purpose of its being transmitted to him with the commission for administering the necessary oath to the party as executor; and such proctor, having received the will and the said letter of the inspector, (in case such letter shall be necessary), shall immediately sue out the previous commission or requisition, or take such other steps as may be necessary towards enabling the executor to obtain probate, and shall enclose in the said letter a copy of the will and the commission or requisition, with instructions for executing the same, and forward the same to the minister by the general post, agreeably to the address put thereon by the inspector."

11 Geo. 4 &
1 Will. 4, c. 20.

[Sect. 56. "That when any petty officer or seaman, non-commissioned officer of marines or marine, shall die intestate, leaving any wages, prize money, or other allowances of money of any kind due to him in respect of services in his majesty's navy, the same shall not be paid to his representatives, except upon letters of administration, to be obtained in the following manner; *videlicet*, the person claiming administration shall send a letter to the inspector, stating his place of abode, the parish in which the same is situate, his degree of relationship to the deceased, the names of the deceased and of the ship or ships to which he belonged, that he has been informed of the intestate's death, and requesting the inspector to give such directions as may enable him to procure letters of administration to the deceased's effects, or to the like effect, upon receipt whereof the inspector shall send by post, under cover, to the minister of the parish wherein the claimant shall reside, a petition in the form heretofore in such cases used, or in such other form as the treasurer of the navy shall deem most expedient and conducive to the purposes of this act, together with the requisite certificates in blank, to be filled up as hereafter mentioned, and a letter pointing out the steps to be taken thereon as hereinafter in that behalf contained, and shall also send to the claimant a letter advising him of the forwarding of the said petition or paper as aforesaid, and pointing out the measures to be taken by him for substantiating his claim; and upon receipt of the said petition the minister, officiating minister, or curate shall, on the application of the claimant, examine him and also such two inhabitant householders of the parish as may be disposed to certify their personal knowledge of him, and their belief of his right to administer to the effects of the intestate, according to the degree of relationship set forth at the head of the petition; and the minister or curate being, upon due examination of the claimant and the said two householders, satisfied of the truth of their answers, and having seen the claimant sign the application, and the two householders sign the certificate (which the minister is required to do), shall add thereto a description of the height, complexion, colour of eyes and hair, age, and any particular marks about the person of the claimant, and after the blanks

Mode of obtaining Administration to Intestate's Effects.

11 Geo. 4 &
1 Will. 4, c. 20.

in the said petition, certificates, and description for those several purposes shall have been filled up agreeable to truth, shall certify to the several particulars by subscribing his signature thereto, for which respective purposes the said claimant and the householders shall attend at such time and place as the minister or curate shall appoint; and the claimant shall, before signing the petition, pay to the minister or curate a fee of two shillings and sixpence for his trouble on the occasion; and the said paper being in all things completed according to the directions therein and hereby given, the minister shall return the same by the general post, addressed to the treasurer of the navy, London; and upon the receipt thereof at the Navy Pay Office, the inspector shall examine the same, and, being satisfied of the claim, he shall transmit to a proctor a certificate thereof, (in the form heretofore used, or in such other form as the treasurer of the navy shall deem expedient); and in case the claimant shall not reside within the bills of mortality, the inspector shall at the same time inclose and send to the said proctor a letter addressed to the minister and churchwardens or elders, (as the case may be), of the parish within which the claimant then shall reside, signifying the transmission of a commission, (which the proctor is to obtain), for swearing the claimant as administrator, with the necessary instructions for executing the same; and the proctor shall, upon receipt thereof, take the requisite steps towards enabling the claimant to obtain letters of administration, and shall in the inspector's letter to the minister enclose the commission or other necessary instrument, with instructions for executing the same, and shall forward such letter and enclosures by the general post, agreeably to the address put thereon by the said inspector."

Minister or
Curate reject-
ing Petition
to state his
Reasons.

[Sect. 57. "Provided always, that in case the minister or curate shall reject any petition for want of satisfactory proof of the claim, he shall state his reasons for such rejection on the said petition, and forthwith return the same to the treasurer of the navy as aforesaid; and in case no application shall be made to the minister or curate by the claimant, or no effectual steps shall be taken by him to complete the petition and the certificates within the space of two calendar months from the date of the inspector's letter accompanying such petition, the minister or curate shall, at the expiration of that time, return the petition to the treasurer of the navy as aforesaid, with his reasons for doing so noted thereon."

2 & 3 Will.
4, c. 40.

Punishment
for sending
false Petitions
to obtain the
Inspector's
Certificate.

[The stat. 2 & 3 Will. 4, c. 40, enacts by s. 33,

["That the petition for probate of will or letters of administration of the effects of any deceased petty officer or seaman, or non-commissioned officer of marines or marine, or for obtaining a check or certificate in lieu of probate or letters of administration in cases of claims where the deceased's assets shall not exceed thirty-two pounds and twenty pounds respectively, shall be addressed to the inspector of seamen's wills, and shall be forwarded to the secretary of the Admiralty; and if any person shall subscribe, transmit, utter, or publish any false petition or application to the said inspector, knowing the same to be false, in order to obtain or to enable any other person to obtain any check or certificate in lieu of probate or letters of administration as aforesaid, every person so offending

shall be deemed guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned for any term not exceeding three years nor less than one year.”

2 & 3 Will. 4,
c. 40.

[The 11 Geo. 4 & 1 Will. c. 20, enacts, s. 58,

“That every minister to whom any such letter, with a commission or requisition for swearing any executor or administrator, shall be transmitted, shall, immediately upon the receipt thereof, take the necessary steps for procuring the execution of the same, and shall transmit the same, when executed, directed to the treasurer of his majesty’s navy, London; and if the executor or administrator shall reside at a distance from the place where the wages or other allowances of money are payable, he shall specify the name and residence of the nearest or most convenient collector of customs or of excise; and upon receipt of the said commission at the Navy Pay Office, the same shall be forwarded to the proctor, who, in pursuance thereof, shall forthwith procure the requisite probate or letters of administration, and when obtained transmit the same to the inspector at the Navy Pay Office.”

11 Geo. 4
& 1 Will. 4,
c. 20.

Minister to
procure Exe-
cution of
Commission.

[Sect. 59. “That when any probate or letters of administration shall have been so obtained, the proctor employed therein shall immediately send the same to the treasurer of the navy, with a copy of the will (in the case of probates), and an account of his charges for the same; and upon receipt thereof the inspector shall issue a check, containing the heads of such probate or letters of administration, and shall note thereon the amount of the proctor’s charges and the address of the claimant, which check shall be in the form heretofore used in the Navy Pay Office, or in such other form as the treasurer of the navy shall deem most expedient for the purpose; and so soon as the wages and prize money due to the deceased shall have been calculated in the proper departments, the amount shall be noted on the check, and, after abating the proctor’s charges, the balance shall be paid to the party personally, or by means of a remittance bill, in the manner and under similar regulations as are hereinbefore provided with respect to other remittances of wages, and the check shall then be delivered to the party to stand instead of probate or letters of administration, to enable him to receive whatever other sums may become payable to the deceased’s estate.”

Check to be
issued by In-
spector.

[Sect. 60. “That if any proctor, registrar, or other officer of any ecclesiastical court shall deliver or cause to be delivered any letters of administration, probate of will, or letters of administration with will annexed, to any other person than the treasurer of the navy or the said inspector, in the manner directed by this act, such proctor or other officer so offending shall for every such offence forfeit the sum of one hundred pounds; and if any agent or agents for prizes shall pay any prize money due to a petty officer or seaman, non-commissioned officer of marines or marine under any authority whatever, other than the inspector’s check directed by this act, such payment shall be null and void, and the agent or agents so paying the same shall forfeit for every and each such offence a sum equal to the amount of the prize money paid.”

No Proctor to
deliver out
Probate or
Letters of
Administra-
tion to any
other than the
Treasurer.

11 Geo. 4 &
1 Will. 4, c. 20.

Limiting the
Expense of
Probate.

[Sect. 61. "That no registrar, proctor, or other officer of any ecclesiastical court shall, under any pretence, take or receive any more for the stamp, seal, parchment, writing, fees, and trouble attending the suing forth the probate of any will or any letters of administration to the effects of any warrant or petty officer or seaman, non-commissioned officer of marines or marine, whereby any person may be enabled to obtain any wages, prize money, or other allowance of money of any kind in respect of services in the navy, than the several sums specified in the schedule hereunto annexed: Provided nevertheless, that if any increase or diminution shall take place in the stamp duties payable on any instrument connected therewith, then the charges shall be increased or diminished to the extent of the change in such duties, but no further: Provided always, that in cases of extraordinary trouble or expense, the proctor shall be allowed to make additional charges in proportion thereto, and if the same shall appear reasonable to the inspector he may allow the same, but otherwise the same shall be submitted to the treasurer of the navy, and if he shall disapprove thereof, the same shall be taxed by the proper officer of the court, without fee or reward, unless the charges shall have arisen in consequence of any litigation or suit, in which case a fee of three shillings shall be allowed to the officer for taxation."

[The stat. 2 & 3 Will. 4, c. 40, s. 14, after reciting this section, and that it is expedient that an alteration should be made in the schedule of fees, enacts,

2 & 3 Will.
4, c. 40.

Fees on Pro-
bates, &c.
contained in
the Schedule
to this Act to
be taken in
lieu of those
specified in
11 Geo. 4,
c. 20.

["That from and after the passing of this act the several sums set forth in the table of fees contained in the schedule annexed to this act, and which shall be deemed as part hereof, shall be allowed and taken, in the cases respectively therein mentioned, in lieu of those specified in the schedule of the said recited act; and if any registrar, proctor, or other person shall demand or receive more than the several sums respectively allowed by the schedule annexed to this act, every person so offending shall forfeit the sum of fifty pounds, which shall be recoverable, with costs of suit, and applicable in the same manner as is provided by the said recited act with respect to pecuniary penalties exceeding twenty pounds: Provided nevertheless, that if any increase or diminution shall take place in the stamp duties payable in respect of any such probates or letters of administration, or of any instrument connected therewith, the sums to be allowed shall be increased or diminished to the extent of the alteration in such stamp duties; and provided also, that in cases of extraordinary trouble or expense such additional allowance shall be made as shall appear reasonable to the commissioners for executing the office of lord high admiral aforesaid."

Proctors and
others indem-
nified for re-
ceiving
greater Fees
than allowed
by Act 11
Geo. 4, c. 20.

[Sect. 15. "And inasmuch as a strict adherence to the letter of such inaccurate schedule would have produced a burden upon the relations of deceased seamen not intended by the said recited act,' be it further enacted, that all registrars, proctors, and others who may, under the authority of the treasurer of the navy or his officers, have been allowed or have received more or other than the sums set forth in the said inaccurate schedule, shall be and are hereby indemnified and released from all penalties and forfeitures which

under the said recited act they may have incurred on any such account."

[The 11 Geo. 4 & 1 Will. 4, c. 20, enacts, s. 62,

"That if any officer, proctor or other person, shall take more than the several sums allowed in the said schedule, every person so offending shall forfeit the sum of fifty pounds, with full costs of suit; or if any registrar, proctor, or other officer of any ecclesiastical court shall knowingly or willingly be aiding or assisting in procuring probate of any will or letters of administration, whereby any person may be enabled to claim any wages, pay, prize money, or allowance of money of any kind for the services of any such petty officer or seaman, non-commissioned officer of marines or marine, otherwise than in the manner prescribed by this act, every such registrar, proctor, or other officer shall for every such offence forfeit and pay the sum of five hundred pounds, and shall moreover forfeit his office and be rendered incapable of acting in any capacity in any court of admiralty or ecclesiastical jurisdiction."

11 Geo. 4
& 1 Will. 4,
c. 20.

Penalty on
Proctors, &c.
offending
against this
Act.

[Sect. 69. "And in order to avoid the expense which the relatives of deceased officers, seamen, and marines may be otherwise obliged to incur to obtain payment of small sums due for the services of such deceased persons, be it enacted, that in all cases when any monies not exceeding twenty pounds shall be due on account of any wages, prize money, or other allowances payable on account of the services of any deceased petty officer, seaman, non-commissioned officer of marines or marine, it shall be lawful for the inspector of seamen's wills, after having, by the requisite previous steps, as before directed, ascertained the right of any claimant to probate of the will or to administration of the effects of the deceased, to issue a check or certificate to that effect, in such form as by the treasurer of the navy shall be deemed expedient; and to the same end, in all cases when any monies not exceeding in the whole the sum of thirty-two pounds shall be payable on account of any pay, or half pay, or pension of any deceased officer of the navy or royal marines, or of any pension to any deceased widow of an officer, or on account of any allowance from the compassionate fund to any deceased person, it shall be lawful for the said treasurer of the navy or for the paymaster of royal marines, as the case may be, after having ascertained in a satisfactory manner the right of any claimant to probate of the will or to letters of administration of the effects of the deceased, and that the deceased has not left any other assets to be administered than the arrears of pay, half pay, pension, or allowance, not exceeding thirty-two pounds, as aforesaid, to issue a certificate to that effect, in such form as shall be deemed expedient; and upon such check or certificate of the inspector, and upon such certificate of the treasurer of the navy and paymaster of royal marines respectively, payment of the monies so due, not exceeding the respective sums of twenty pounds and thirty-two pounds as aforesaid, shall be made to the parties named in such checks and certificates respectively, either personally, or, if they shall desire it, by remittance bill in the manner by this act provided with respect to payments by remittance; and all payments made under such checks and certificates, not exceeding the respective sums aforesaid, shall be as effectual and legal as if the same

Sums not ex-
ceeding 20l.
due to de-
ceased Petty
Officers to be
paid on Cer-
tificate.

had been made under any probate of a will or letters of administration duly granted by the proper court, and shall be allowed to the said treasurer and paymaster of royal marines in their respective accounts."

2 & 3 Will. 4, c. 40. [Stat. 2 & 3 Will. 4, c. 40, s. 12, reciting the first part of this section, enacts,

Inspectors' Duty with regard to Claims under certain Sums.

["That from and after the passing of this act the investigation of all claims to the effects of any such deceased persons shall be made by the inspector of seamen's wills in the manner required by the said recited act in cases of similar claims to pay for services in the royal navy; and the said inspector, after duly investigating the claim, and the amount of the deceased's assets, is hereby authorized in any such cases to issue a check or certificate as is required by the said act with respect to naval pay; and that all payments not exceeding in the whole thirty-two pounds of pay, half pay, pension, or allowances of deceased officers of the navy and marines, and of widows' pensions, and of allowances from the compassionate fund, and all payments not exceeding in the whole twenty pounds of monies due to any deceased persons on account of prize money, and for the services of deceased non-commissioned officers, drummers, and privates of marines, to be made under any such certificate, shall be as effectual and legal as if the same had been made under any probate of a will or letters of administration: Provided always, that in order to allow time for the production of any will which may have been made by any such deceased person, and to guard against fraud, no check or certificate whatever shall be granted in lieu of letters of administration, under this or the said recited act, until three calendar months shall have elapsed from the time of notice being given to the inspector of the death of the person whose effects are claimed."

Inspector may administer Oaths.

["Sect. 13. And for the better investigation of claims to the effects of deceased persons under this or the said recited act, be it further enacted, that from and after the passing of this act the said inspector shall have full power and authority to administer an oath or affirmation to any claimants touching their claims, either as the representatives or the creditors of the deceased, and to the witnesses to be adduced in support of any such claims; and that the certificate of the allowance of the claim shall be in such form as the commissioners for executing the office of lord high admiral shall authorize."

4 & 5 Will. 4, c. 25. [And the 4 & 5 Will. 4, c. 25, s. 8, reciting the last part of the section 69 of 2 Geo. 4, enacts that—

Inspector's Duty as to Monies due to deceased Persons extended.

["In the case of the death of any commissioned, warrant, or petty officer, seaman, commissioned or non-commissioned officer of royal marines, or private marine, or of any widow entitled to a pension on the establishment of the navy, or of any person entitled to an allowance from the compassionate fund, or of any person having been employed in any of his majesty's dock yards, naval, victualling, or medical establishments, or in any of the civil departments of the navy, or of any person entitled to any prize money, bounty, grant, or other money in the nature of naval prize, and respectively leaving assets to be administered which shall not in the

whole exceed the sum of thirty-two pounds, it shall be lawful for the inspector of seamen's wills in the Admiralty Office, after having satisfied himself, by due investigation, of the right of any claimant to probate of the will if the deceased shall have left a will, or, in case of intestacy, to letters of administration, and also on due proof, to the satisfaction of the inspector, that the assets of the deceased to be administered do not in the whole exceed the sum of thirty-two pounds, to issue a certificate to that effect and in admission of the claim, which certificate shall be in such form as by the commissioners for executing the office of lord high admiral aforesaid shall be deemed expedient, and so far as regards any monies payable in the naval department, and not exceeding thirty-two pounds, shall have the same force and effect as a probate of the deceased's will, or a grant of administration of the deceased's effects, could or might have; and that payment to be made under the authority of such certificate of any monies not exceeding the said sum of thirty-two pounds, due to the deceased on account of any naval pay or wages, or pay or wages of the ordinary, or any marine pay, or of any half pay, pension, or prize, or bounty, grant, or other money in the nature of prize, or of any allowance from the compassionate fund, or monies due on account of the deceased's services, or superannuation allowances granted on retirement from any services in any of his majesty's dock yards, naval, victualling, or medical establishments, or in any of the civil departments of the navy, or any department under the direction of the said commissioners, shall be valid and conclusive against all parties as effectually as if the same had been paid under probate or letters of administration, and shall be allowed to the treasurer of the navy in his accounts."

4 & 5 Will. 4,
c. 25.

[The 11 Geo. 4 & 1 Will. 4, c. 20, enacts,

11 Geo. 4
& 1 Will. 4,
c. 20.

[Sect. 74. "That all letters and packets addressed to and sent by the inspector of seamen's wills and letters of attorney for the time being, upon any business or affairs of or relating to the said office of inspector, and all letters and packets in relation to officers and seamen's wages sent, in the execution of this act, by the cashier or other officer in the Navy Pay Office appointed for paying seamen's tickets, and all letters and packets in relation to remittances, half pay, pension, bounty, and allowances from the compassionate fund, sent, in the execution of this act, by the officer or clerk to be nominated by the treasurer of the navy for that purpose, and all letters and packets in relation to widows' pensions sent, in the execution of this act, by the officer or clerk to be nominated by the treasurer of the navy for that purpose, shall be free from the duty of postage; and all such letters and packets which shall be forwarded by the said inspector, cashier, officers, and clerks respectively shall be under cover, with the words, 'Pursuant to act of parliament of 11th George 4th,' printed on the same; and the said inspector, cashier, officers, and clerks respectively sending the same shall sign their respective names under such words; and if any such inspector, cashier, officer, or clerk, or any other person, shall send or cause to be sent, under any such cover, any letter, paper or writing, or any inclosure, other than what shall relate to the public business of the several departments of the Navy Pay

Letters to
and from cer-
tain other
Officers to go
free.

Regulation
as to such
Letters.

Penalty for
infringing
such Regula-
tions.

11 Geo. 4 &
1 Will. 4, c. 20.

Act to extend
to the Royal
Marines.

Punishment
for personat-
ing any Offi-
cer, &c.

Punishment
for taking a
false Oath
in order to
obtain Pro-
bate, &c.

Punishment
for subscrib-
ing false Pe-
tition.

Office and Navy Office, every such person so offending shall for every such offence forfeit and pay the sum of one hundred pounds."

[Sect. 81. "That all the clauses, provisions, and regulations herein contained shall, so far as the same can be applied, extend to the non-commissioned officers, drummers, and privates of royal marines, in respect of their services on board any of his majesty's ships."

[Sect. 84. "That if any person shall falsely and deceitfully personate any commission, warrant, or petty officer, or seaman, or commission or non-commissioned officer of marines or marine, or the wife, widow, or relation, executor, administrator, or creditor of any such officer, seaman, or marine, or any person entitled to any allowance from the compassionate fund of the navy, in order to receive any wages, pay, half pay, prize money, bounty money, pension, or any part thereof, gratuity or other allowance for money due or payable, or supposed to be due or payable, to any such officer, seaman, or marine, or to the wife or widow, relation, executor, administrator, or creditor of any such deceased officer, seaman, or marine, or any allowance to any person from the said compassionate fund, with intent to defraud any person whomsoever, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life or for any term not less than seven years, or to be imprisoned for any term not exceeding four years nor less than two years."

[Sect. 85. "That if any person shall fraudulently and deceitfully take a false oath, in order to obtain probate of any will or letters of administration of the effects of any deceased commission, warrant, or petty officer, or seaman, or commission or non-commissioned officer of marines or marine; or if any person shall fraudulently receive or demand any wages, pay, prize money, bounty money, pension, or any part thereof, or any allowance of money whatever, payable or supposed to be payable in respect of the services of any such officer, seaman, or marine, or from the compassionate fund of the navy, or any pension to the widow of an officer, upon or by virtue of any probate of a will or letters of administration, knowing such will to be forged, or such probate or letters of administration to have been obtained by means of a false oath, with intent in any of the said cases to defraud any person whomsoever, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life or for any term not less than seven years, or to be imprisoned for any term not exceeding four years nor less than two years."

[Sect. 86. "That if any person shall subscribe any false petition or application to the treasurer of his majesty's navy or to the paymaster of royal marines, falsely and deceitfully representing herself or himself therein to be the widow, executor, nearest or one of the nearest of kindred of any deceased commission or warrant officer of the navy, or commission officer of marines, or of any petty officer or seaman, non-commissioned officer of marines or marine, or shall utter or publish any such petition or application, knowing the same to be false, in order to procure, or to enable any other person to

procure, a certificate from the said inspector of seamen's wills or from the paymaster of royal marines as hereinbefore respectively provided, thereby to obtain, or to enable any other person to obtain, without probate or letters of administration, payment of any wages, pay, half pay, or pension, or any allowance from the compassionate fund of the navy, or payment of any wages, prize money, or allowances payable in respect of the services of any officer, seaman, or marine in the royal navy, or thereby to obtain, or to enable any other person to obtain, probate of the will or letters of administration of the effects of any deceased petty officer, seaman, non-commissioned officer of marines or marine; or if any person shall receive or demand any wages, pay, half pay, prize money, bounty money, pension, or arrears thereof, or any other allowance due or payable in respect of the services of any commission or warrant officer of the navy, or commission officer of royal marines, or of any petty officer, seaman, non-commissioned officer of marines, or marine, upon or by virtue of any certificate of the inspector of seamen's wills or paymaster of royal marines respectively as aforesaid, knowing any such certificate to have been obtained by any false representation or pretence; every such offender shall be deemed guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years and not less than seven years, or to be imprisoned for any term not exceeding three years nor less than one year."

11 Geo. 4 &
1 Will. 4, c. 20.

[Sect. 87. "That if any person shall forge, or shall utter, offer, or exhibit, knowing the same to be forged, any paper writing purporting to be an extract from any register of marriage, baptism, or burial, or any certificate of marriage, baptism, or burial, in order to sustain any claim to any wages, prize money, or other monies due or payable in respect of the services of any officer, seaman, or marine in his majesty's navy, or to sustain any claim to any half pay payable to an officer of the royal navy or marines, or to any pension as the widow of an officer, or to any payment or allowance from the compassionate fund of the navy, or to any gratuity or bounty of his majesty given to the relatives of persons slain in fight with the enemy; or if any person shall make any false affidavit, or utter or exhibit any false affidavit, certificate, or other voucher or document, in order fraudulently to procure any person to be admitted a pensioner as the widow of an officer of the royal navy, or in order to sustain any claim to any wages, prize money, or other monies, or to any half pay or pension, or arrears thereof, or any allowance from the compassionate fund of the navy, or to any gratuity or bounty as aforesaid, with intent to defraud any person whomsoever; every person in any of the said cases offending shall be deemed guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years and not less than seven years, or to be imprisoned for any term not exceeding three years nor less than one year."

Punishment
for forging
Certificates,
&c., or utter-
ing false
Vouchers.

[Sect. 88. "That in the case of every offence made felony by this act, every principal in the second degree and every accessory before the fact shall be punishable in the same manner as the principal in the first degree is by this act punishable; and every acces-

As to Prin-
cipals in the
second De-
gree, and
Accessaries.

11 Geo. 4 &
1 Will. 4, c. 20.

sary after the fact to any such felony shall, on conviction, be liable to be imprisoned for any term not exceeding two years; and that where any person shall be convicted of any offence punishable under this act for which imprisonment shall or may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, as to the court in its discretion shall seem meet."

[It will be seen that no alteration has been effected in the previous law upon soldiers' and sailors' wills by 1 Vict. c. 26. (*Vide infra*, ss. 11, 12.—ED.)]

[SCHEDULE of TABLE of FEES to be taken for PROBATES of WILLS, LETTERS of ADMINISTRATION, and LETTERS of ADMINISTRATION with WILL ANNEXED, of Warrant and Petty Officers, and Non-commissioned Officers of Marines, and also of Common Seamen and Marines, in pursuance of this Act.

PROBATES.						
	Under what Sum the Effects sworn.	Where the Deceased was a Warrant or Petty Officer in the Navy, or a Non-commissioned Officer of Marines.		Where the Deceased was a Common Seaman or Marine.		
		If the Executor be a Wife, Child, Parent, Brother, or Sister of the Deceased.	If the Executor be more remotely related, or a Stranger in Blood to him.	If the Executor be a Wife, Child, Parent, Brother, or Sister, of the Deceased.	If the Executor be more remotely related, or a Stranger in Blood to him.	
	£	£ s. d.	£ s. d.	£ s. d.	£ s. d.	
If the Executor sworn in London	20	0 7 0	0 16 6	0 7 0	0 16 6	
	50	1 0 6	1 10 6	0 11 0	1 1 0	
	100	1 8 6	1 15 6	0 19 0	1 6 0	
If the Executor sworn in the Country by Commission .	20	0 19 0	1 12 0	0 19 0	1 12 0	
	50	1 17 0	2 12 6	1 7 6	2 3 0	
	100	2 8 0	2 17 6	1 18 6	2 8 0	

(continued)

TABLE OF FEES—continued.

ADMINISTRATIONS, AND ADMINISTRATIONS WITH WILL ANNEXED.											
	Under what Sum the Effects sworn.	Where the Deceased was a Warrant or Petty Officer in the Navy, or a Non-commissioned Officer of Marines.				Where the Deceased was a Common Seaman or Marine.					
		If the Administrator be a Wife, Child, Parent, Brother, or Sister of the Deceased.		If the Administrator be more remotely related, or a Stranger in Blood to him.		If the Administrator be a Wife, Child, Parent, Brother, or Sister of the Deceased.		If the Administrator be more remotely related, or a Stranger in Blood to him.			
		Administrations Intestate.	Administrations with Will annexed.	Administrations Intestate.	Administrations with Will annexed.	Administrations Intestate.	Administrations with Will annexed.	Administrations Intestate.	Administrations with Will annexed.		
If the Administrator sworn in London . .	£	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
	20	0 12 6	0 15 0	1 3 0	1 8 0	0 12 6	0 15 0	1 3 0	1 18 0	0 12 6	0 15 0
	50	2 5 6	2 9 0	2 16 0	3 2 0	0 16 0	0 19 6	2 6 6	2 12 6	2 5 6	2 9 0
	100	3 3 6	2 18 6	3 19 0	3 16 6	1 4 0	1 9 0	2 19 6	3 7 0	3 3 6	3 7 0
If the Administrator sworn in the County by Commission . . .	20	0 19 6	1 2 0	1 13 6	1 18 6	0 19 6	1 2 0	1 13 6	1 18 6	0 19 6	1 2 0
	50	2 17 0	3 0 6	3 13 0	3 19 0	1 7 6	1 11 0	3 3 6	3 9 6	2 17 0	3 0 6
	100	3 18 0	3 13 0	4 15 0	4 12 6	1 18 6	2 3 6	3 15 6	4 3 0	3 18 0	3 13 0

[IV. *After Jan. 1, 1838—1 Vict. c. 26, and Decisions thereon.*

[On the 3rd of July, 1837, "An Act for the Amendment of the Laws with respect to Wills" was passed (*a*); it came into operation after the 1st of January, 1838, from which period it governs all wills made in Great Britain, Scotland being expressly exempted from the operation of the statute. The power of bequeathing *personal* property became complete and unrestricted about the middle of the seventeenth century, but, as we have seen in the former pages of this volume, the power conferred by statutes over the disposition of *real* estate was defective, making no provision for the following cases:—1. Customary and copyhold estates; 2. Rights of action and entry; 3. Contingent and estates in joint tenancy; 4. Estates in tail and *quasi* entail; 5. Estates for the lives of others; 6. Realty acquired after the making of the will. As to the (1) customary and copyhold estates, the reader will find provisions in the 3rd, 4th and 5th sections; as to (2) rights of action and entry, in the 3rd section; (3) as to contingent estates, also in the 3rd section; (4) estates in tail and *quasi* entail are not included in the enabling clause of the act (s. 3), and therefore continue still undevisable (*b*). It may be as well to mention the recommendation contained in the report of the Real Property Commissioners upon this subject:—"We think it, on the whole, expedient that joint tenants should be required to sever the joint estates; and that tenants in tail and *quasi* entail should still be required to bar the entail for the purpose of enabling them to devise their estates. Questions would otherwise arise whether general devises of the testator's property were intended to comprise such estates, and expense and embarrassment in titles would be created by the necessity of inquiring whether a tenant in tail had died intestate (*c*)."] It has been said that the legislature, as far as relates to *joint estates*, has carried into effect the advice of the commissioners; but tenants in *estates tail* and *quasi* in tail are confined to their former power of barring their issue by deed. (5) estates for the life of others are made devisable by the 3rd section; and (6) realty acquired by the testator after the date of the will, which could not before this act pass without republication, but by section 24 of this act all property to which the testator is entitled at the time of his death will pass.

(*a*) [It was founded on the Fourth Report of the Commissioners for inquiring into the Law of England respecting Real Property. See the speech of Lord Langdale, February 23rd, 1837, in the House of Lords. See also a Treatise on the New Act by Mr. George Sweet, written with a

thorough knowledge of the subject.—*Ed.*]

(*b*) [An *estate* is called a *quasi estate tail* when it is limited to a person and the heirs of his body so long as another person or persons named shall live.—*Ed.*]

(*c*) [Fourth Rep. Real Prop. 23.]

[It seemed desirable to recapitulate in this place these alterations effected by the new Will Act, but both these and others, as to "who may make" and the "form and manner" of making a will, have been alluded to in the preceding chapters.

[Definitions.

[Sect. 1. "Be it enacted," &c. "That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows, (that is to say), *the word 'will' shall extend to a testament, and to a codicil*, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an act passed in the twelfth year of the reign of King Charles the Second, intituled (*d*), 'An Act for taking away the Court of Wards and Liveries, and Tenures *in capite* and by Knights Service, and Purveyance, and for settling a Revenue upon His Majesty in lieu thereof,' or by virtue of an act passed in the parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled 'An Act for taking away the Court of Wards and Liveries, and Tenures *in capite* and by Knights Service,' and to any other testamentary disposition; and the words 'real estate' shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold (*e*), or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest (*f*)) therein; and the words 'personal estate' shall extend to leasehold estates and other chattels real, and also to monies, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein (*g*); and every word importing the singular number only shall extend and be applied to several persons

1 Vict.
c. 26.
Meaning of
certain Words
in this Act.

Of "Wills."

12 Car. 2,
c. 24.

14 & 15 Car.
2, (1).

"Real Es-
tate;"

"Personal
Estate;"

Number;

(*d*) [See these acts above.]

(*e*) [Copyholds, it has been seen, were not within any of the former Will Acts, except 55 Geo. 3, c. 192, which supplied the want of surrenders to wills.—Ed.]

(*f*) [Real estate purchased for purposes of partnership is said to be invested with the attributes of per-

sonalty. *Phillips v. Phillips*, 1 Myl. & K. 649.—Ed.]

(*g*) [Copyholds which are not mentioned here are clearly personal estate, see *Duke of Queensbury v. Shilbear*, 2 Eden, 29. As to land to be converted into money, see the *doctrine of constructive conversion*, p. 188.—Ed.]

1 Vict. c. 26.

Gender.

or things as well as one person or thing : and every word importing the masculine gender only shall extend and be applied to a female as well as a male (*h*)."

[Acts repealed.]

Repeal of the
Statutes of
Wills, 32
Hen. 8, c. 1,
and 34 & 35
Hen. 8, c. 5.

10 Car. 1,
sess. 2, c. 2,
(1.)

Ss. 5, 6, 12,
19, 20, 21 &
22 of the Sta-
tute of Frauds.

29 Car. 2, c. 3.

7 Will. 3,
c. 12, (1.)

S. 14 of 4 & 5
Ann. c. 16.

6 Ann. c. 10,
(1.)

S. 9 of 14
Geo. 2, c. 20.

25 Geo. 2, c.
6, (except as
to Colonies.)

25 Geo. 2,
c. 11, (1.)

[Sect. 2. "That an act passed in the thirty-second year of the reign of King Henry the Eighth, intituled, 'The Act of Wills, Wards, and Primer Seisins, whereby a Man may devise Two Parts of his Land,' and also an act passed in the thirty-fourth and thirty-fifth years of the reign of the said King Henry the Eighth, intituled 'The Bill concerning the Explanation of Wills,' and also an act passed in the parliament of Ireland, in the tenth year of the reign of King Charles the First, intituled, 'An Act how Lands, Tenements, etc. may be disposed by Will or otherwise, and concerning Wards and Primer Seisins,' and also so much of an act passed in the twenty-ninth year of the reign of King Charles the Second, intituled 'An Act for Prevention of Frauds and Perjuries,' and of an act passed in the parliament of Ireland in the seventh year of the reign of King William the Third, intituled, 'An Act for Prevention of Frauds and Perjuries,' as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements, or hereditaments, or any clause thereof, or to the devise of any estate *pur autre vie*, or to any such estate being assets, or to nuncupative wills, or to the repeal, altering, or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise, or bequest therein ; and also so much of an act passed in the fourth and fifth years of the reign of Queen Anne, intituled 'An Act for the Amendment of the Law, and the better Advancement of Justice,' and of an act passed in the parliament of Ireland, in the sixth year of the reign of Queen Anne, intituled 'An Act for the Amendment of the Law and the better Advancement of Justice,' as relates to witnesses to nuncupative wills ; and also so much of an act passed in the fourteenth year of the reign of King George the Second, intituled 'An Act to amend the Law concerning Common Recoveries, and to explain and amend an Act made in the twenty-ninth year of the reign of King Charles the Second, intituled "An Act for the Prevention of Frauds and Perjuries,"' as relates to estates *pur autre vie* ; and also an act passed in the twenty-fifth year of the reign of King George the Second, intituled 'An Act for avoiding and putting an end to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates in that part of Great Britain called England, and in His Majesty's Colonies and Plantations

(*h*) [This act does not mention, *tiones causâ mortis*, the law on which and therefore does not affect, *Dona-* see above, p. 139.—ED.]

in America, except so far as relates to His Majesty's Colonies and Plantations in America; and also an act passed in the parliament of Ireland in the same twenty-fifth year of the reign of King George the Second, intituled 'An Act for the avoiding and putting an end to certain Doubts and Questions relating to the Attestations of Wills and Codicils concerning Real Estates,' and also an act passed in the fifty-fifth year of the reign of King George the Third (*i*), intituled 'An Act to remove certain Difficulties in the Disposition of Copyhold Estates by Will,' shall be and the same are hereby repealed, except so far as the same acts or any of them respectively relate to any wills or estates *pur autre vie* to which this act does not extend (*k*)."

1 Vict. c. 26.

55 Geo. 3, c. 192.

[*Enabling Clause.*]

[Sect. 3. "That it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which if not so devised, bequeathed, or disposed of, would devolve upon the heir at law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold (*l*), notwithstanding that the testator may not have surrendered the same to the use of his will (*m*), or notwithstanding that, being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this act, if this act had not been made; and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether

All Property may be disposed of by Will,

comprising Customary Freeholds and Copyholds without Surrender and before Admittance, and also such of them as cannot now be devised;

Estates *pur autre Vie*;

(*i*) [See these acts above, pp. 98, 108.]

(*k*) [The provisions of 12 Car. 2, c. 24, relating to the testamentary appointment of guardians, continue valid, except that such can no longer be made by an infant, see s. 7.—Ed.]

(*l*) [As to lands held by *copy of court roll*, see *Doe v. Llewellyn*, 2 C., M. & R. 503; and 1 Russ. & Myl.

33, for distinction between copyholds and customary freeholds.—Ed.]

(*m*) [As to the case of a purchaser or surrenderee before this act, see *Phillips v. Phillips*, 1 Myl. & K. 649; *Lewis v. Lane*, 2 Myl. & K. 449; as to the heir's right to devise before admittance, see *King v. Turner*, 2 Sim. 545.—Ed.]

1 Vict. c. 26.
contingent
Interests;

Rights of
Entry;
and Property
acquired after
Execution of
the Will.

the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will."

[*Copyhold and Customary Estates.*

As to the
Fees and
Fines pay-
able by De-
visees of Cus-
tomary and
Copyhold
Estates.

[Sect. 4. "That where any real estate of the nature of customary freehold or tenant right, or customary or copyhold, might, by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will shall be entitled to be admitted, except upon payment of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering, or enrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator: Provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine, and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering, or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine, or sums of money due as aforesaid, shall be paid in addition to the stamp duties, fees, fine, or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid."

Wills or
Extracts of
Wills of Cus-

[Sect. 5. "That when any real estate of the nature of customary freehold or tenant right, or customary or copyhold,

shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor; and when any trusts are declared by the will of such real estate, it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such will (o); and when any such real estate could not have been disposed of by will if this act had not been made, the same fine, heriot, dues, duties, and services, shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall as against the devisee of such estate have the same remedy for recovering and enforcing such fine, heriot, dues, duties, and services as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent."

1 Vict. c. 26.
customary Freeholds and Copyholds to be entered on the Court Rolls;

and the Lord to be entitled to the same Fine, &c. when such Estates are not now devisable as he would have been from the Heir in case of Descent,

[*Estates pur autre Vie.*

[Sect. 6. "That if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator, either by reason of a special occupancy or by virtue of this act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate (p)."

Estates pur autre Vie.

[*Who may make.*

[Sect. 7. "That no will made by any person under the age of twenty-one years shall be valid (q)."

No Will of a Person under Age valid;

(o) [No authentication of will was necessary before this act. See 3 B. P. C. Toml. ed.; 15 Vesey, 297; *Jervoise v. Duke of Northumberland*, 1 J. & W. 570; 1 Ld. Raym. 755.—Ed.]

it should seem that estates *quasi* in tail remain incapable of being devised, and not subject to debts; *Campbell v. Sandys*, 1 Sch. & Lef. 294; *Ditton v. Ditton*, 2 Ball & B. 77.—Ed.]

(p) [As neither in the third nor in this section heirs special are named,

(q) [See above p. 122, on this subject, and Sugden on Powers, 213.]

1 Vict. c. 26.

nor of a Feme
Covert, ex-
cept such as
might now be
made.

Every Will
shall be in
Writing, and
signed by the
Testator in
the Presence
of Two Wit-
nesses at one
Time.

Appoint-
ments by Will
to be exe-
cuted like
other Wills,
and to be va-
lid, although
other re-
quired So-
lemnities are
not observed.

Soldiers and
Mariners'
Wills ex-
cepted.

Act not to
affect certain
Provisions of
11 Geo. 4 & 1
Will. 4, c. 20,
with respect
to Wills of
Petty Officers
and Seamen
and Marines.

[Sect. 8. "That no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this act (r)."]

[Form and Manner.

[Sect. 9(s). "That no will shall be valid unless it shall be in writing (t) and executed in manner herein-after mentioned; (that is to say,) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary (u)."]

[Sect. 10. "That no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner herein-before required; and every will executed in manner herein-before required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or other solemnity (x)."]

[Soldiers and Mariners.

[Sect. 11. "That any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of his act."]

[Sect. 12. "That this act shall not prejudice or affect any of the provisions contained in an act passed in the eleventh year of the reign of his majesty King George the Fourth and the first year of the reign of his late majesty King William the Fourth, intituled 'An Act to amend and consolidate the Laws relating to the Pay of the Royal Navy,' respecting the wills of petty officers and seamen in the royal navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize money, bounty money, and allowances, or

(r) [It may be doubtful whether this act will be held to dispense with the surrender to the use of the will of a married woman as to lands which she may devise by special custom; *Doe v. Bartle*, 5 B. & Ald. 492. As to her power of bequeathing her estates and separate savings, see *Fet- tiplace v. George*, 1 Ves. jun. 46; and V. Williams on Ex. and Adm. vol. i. 591; 1 Sugd. Powers, 183; see above, p. 64.—Ed.]

(s) [See above, p. 98.]

(t) [As to nuncupative wills, see above, p. 135.]

(u) [For the decisions on this clause, which has rendered many wills invalid, and defeated many testator's intentions since it became law, see below, cases before the Prerogative Court of Canterbury.—Ed.]

(x) [As to execution of powers before the year 1838, see Sugden on Powers, c. 6, s. 4.]

other monies payable in respect of services in her majesty's navy." 1 Vict. c. 26.

[No Publication.

[Sect. 13. "That every will executed in manner herein-before required shall be valid without any other publication thereof (y)."

Publication not to be requisite.

[Witnesses.

[Sect. 14. "That if any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid (z)."

Will not to be void on account of incompetency of attesting Witness.

[Sect. 15. "That if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will."

Gifts to an attesting Witness to be void.

[Sect. 16. "That in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor notwithstanding such charge shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof."

Creditor attesting to be admitted a Witness.

[Sect. 17. "That no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof."

Executor to be admitted a Witness.

[Revocation.

[Sect. 18. "That every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal

Will to be revoked by Marriage.

(y) [Publication, as distinguished from mere attestation, was not necessary to the validity of a will under the statute of frauds. See among many other cases *Johnson v. Johnson*, 1 C. & M. 140; and as to publication of

wills made in exercise of powers, *Doe d. Spilsbury and another v. Burdett*, 6 Nev. & M. 259.—Ed.]

(z) [See above, p. 104; *Guise v. Workwell*, March 3, 1840, 7 M. & M. 137.]

1 Vict. c. 26.

estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the statute of distributions)."

No Will to be revoked by Presumption.

[Sect. 19. "That no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances."

No Will to be revoked but by another Will or Codicil, or by a Writing executed like a Will, or by Destruction.

[Sect. 20. "That no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same (b)."

[Alterations.

No Alteration in a Will shall have any Effect unless executed as a Will.

[Sect. 21. "*That no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will (c).*"

[Revival.

No Will revoked to be revived otherwise than by Re-execution or a Codicil to revive it.

[Sect. 22. "That no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or *by a codicil executed in manner hereinbefore required*, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown (d)."

[Subsequent Conveyance.

A Devise not to be rendered inoperative by any subsequent Conveyance or Act.

[Sect. 23. "That no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by

(b) [See above, p. 239, &c. See below, decisions on this clause.]

(c) [See below, decisions on this clause.]

(d) [See above, p. 239, &c..]

which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death." 1 Vict. c. 26.

[*Will to speak from Death of Testator.*

[Sect. 24. "That every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will (e)."] A Will shall be construed to speak from the Death of the Testator.

[*Residuary Devise.*

[Sect. 25. "That, unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will (f)."] A Residuary Devise shall include Estates comprised in lapsed and void Devises.

[*Construction (g).*

[Sect. 26. "That a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as of freehold estates, unless a contrary intention shall appear by the will."] A general Devise of the Testator's Lands shall include Copyhold and Leasehold as well as Freehold Lands.

[Sect. 27. "That a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be),"] A general Gift shall include Estates over which the Testator has a general Power of Appointment.

(e) [See above, p. 227.]

(g) [See above, p. 158.]

(f) [Ibid.]

1 Vict. c. 26.

A Devise
without any
Words of
Limitation
shall be con-
strued to pass
the Fee.

The Words
“die without
Issue,” or
“die without
leaving
Issue,” shall
be construed
to mean
die without
Issue living
at the Death.

No Devise
to Trustees
or Executors,
except for a
Term or a
Presentation
to a Church
shall pass a
Chattel
Interest.

Trustees
under an un-
limited De-
vise, where
the Trust
may endure
beyond the
Life of a Per-
son benefi-
cially entitled
for Life, to
take the Fee.

which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.”

[Sect. 28. “That where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will.”

[Sect. 29. “That in any devise or bequest of real or personal estate the words ‘die without issue,’ or ‘die without leaving issue,’ or ‘have no issue,’ or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: provided, that this act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.”

[*Estate of Trustees (h).*

[Sect. 30. “That where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication.”

Sect. 31. “That where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.”

(h) [See above, p. 166.]

[*Lapse as to Realty(i).*

[Sect. 32. "That where any person to whom any real estate shall be devised for an estate tail or an estate in *quasi* entail shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

Devises of Estates Tail shall not lapse.

[*Lapse of Gifts to Children.*

[Sect. 33. "That where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

Gifts to Children or other Issue who leave Issue living at the Testator's Death shall not lapse.

[*Estates pur autre Vie.*

[Sect. 34. "That this act shall not extend to any will made before the first day of January one thousand eight hundred and thirty-eight, and that every will re-executed or republished or revived by any codicil, shall for the purposes of this act be deemed to have been made at the time at which the same shall be so re-executed, republished or revived; and that this act shall not extend to any estate *pur autre vie* of any person who shall die before the first day of January one thousand eight hundred and thirty-eight."

Act not to extend to Wills made before 1838, nor to Estates *pur autre Vie* of Persons who die before 1838.

[*Scotland.*

[Sect. 35. "That this act shall not extend to Scotland."

Act not to extend to Scotland.

[The following cases have been decided by the Judge of the Prerogative Court of Canterbury since the passing of this act, but it should be remembered that most of them have been cases in which the instruments have not been formally propounded, but heard on *ex parte* motions.

[Section 8 provides, "*that no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this act.*"

Section 8.

[In *Walters v. Metford(k)*, it was held, that a power in a married woman to dispose of certain property by will to be

(i) [See above, p. 213.]

(k) [2 Curt. 221.]

Cases decided
under Section
8.

signed and published by her in the presence of two witnesses, was not duly executed by a paper purporting to be signed and sealed as a will in the presence of two witnesses, omitting to state in the attestation clause that it was published; but as the power did not require that the will should be *attested*, parol evidence was admitted to show that publication had taken place; the will was made in 1823. The court finally pronounced against the paper on the insufficiency of the evidence. *In the goods of M. E. Metford*, by the terms of the power the will or codicil executed by the wife was required to be "signed and published by her in the presence of two or more credible witnesses," but it was not required that the signature and publication should be attested. The will alone had a written attestation of the signature and publication; the codicil, which was a holograph of the testatrix, had no attestation clause, though signed by three witnesses, one of whom deposed that the testatrix signed, delivered and published the same as a codicil to her will, in her presence and that of the other two witnesses. The court granted letters of administration to the husband as sole executor named in the will, and it was held, that parol evidence might be admitted to show that publication had taken place according to the power. The will was made in 1824, and the codicil in 1830 (l).

[It seems to be the inclination of the court, if there is any doubt as to the due execution of the power, and if the application of probate be unopposed, to allow it to pass, leaving the question as to the due execution of the power open to the courts of equity (m).

Section 9.

[Section 9 enacts, "*That no will shall be valid unless it shall be in writing,*" &c. "*and signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.*"

Cases decided
under Section
9.

[*In the goods of James Ayling, deceased*(n). The deceased in this case left a will, dated the 15th of May, 1838, which he signed at the foot, and there were the names of two witnesses on the will, as having attested the execution; but the attestation clause not being full, an affidavit was required by the registrars, (agreeably to the directions of the court), to show that the statute had been complied with, when it appeared that the witnesses were not present at the same time, as required by the 9th section of the act. Under these circumstances, Robertson prayed the court to decree administration of the effects of the deceased, as dead intestate.

(l) [16 Mar. 1841, Prerog.]

(m) [*In the goods of Sarah Big-*

gor, 2 Curt. 336.]

(n) [1 Curt. 913.]

[*Per curiam*: “The court cannot decree administration to pass the effects of the deceased as dead intestate, unless the will has been propounded. Cases decided under Sect. 9.”

[“Although, from what appears in the present case, it is clear that this will is invalid, under the statute 1 Vict. c. 26; yet this is only on affidavits *ex parte*; there might, therefore, be collusion. *All that the court will do in such cases is to reject the prayer for probate, leaving the parties to take out administration if they think proper; as, notwithstanding the court declines to grant probate, the will might be propounded and established.*”

[*In the goods of William Milward, deceased* (o). William Milward died on the 9th of June, 1838. He left a will which was written upon two sides of paper; at the bottom of the first side the deceased signed his name, and his signature was attested by two witnesses, that side of the paper ended with an unfinished sentence, and the will concluded on the second side, “dated this 11th of April, 1838,” but there was no signature.

[*Per curiam*: “The deceased having unfortunately omitted to sign the will at the foot or end, as required by the 9th section of the statute, the instrument is void.”

[*In the goods of Thomas Newman* (p). The deceased died on the 11th of September, 1838. He left a will with a codicil thereto, dated in 1834. On the day of his death he executed a second codicil, by signing the same in the presence of two witnesses present at the same time, but the testator being very ill, they removed into another room, where they subscribed their names as witnesses.

[The court refused probate of the second codicil, as not having been attested in the presence of the testator.

[*In the goods of Cornelius Regan* (q). *Per curiam*: “The deceased died in March last, he made his will, and signed it in the presence of one witness; he afterwards acknowledged his signature in the presence of three witnesses present at the same time, who attested it in his presence; the 9th section of the act, 1 Vict. c. 26, enacts, that a will shall be signed at the foot or end thereof by the testator or by some other person in his presence, and by his direction, and that ‘such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time:’ it has been suggested that the word ‘acknowledged’ refers only to a signature when made for the testator by another person, but I am of opinion that the acknowledgment by the testator of his own signature or the signature made by some other person in his presence, and by his direction, is sufficient, if attested as required by the act.”

(o) [1 Curt. 912.] (p) [1 Curt. 914.] (q) [1 Curt. 909.]

Cases decided
under Sect. 9.

[*In the goods of John Bailey (r).* John Bailey died on the 30th of November, 1838, having executed his will on the 8th of that month, in the following manner, namely:—The name of the deceased was signed by Robert Harvey, one of the subscribed witnesses, at the foot thereof, by the deceased's direction, in his presence, and also in the presence of Matthew Smith, the other subscribed witness, who was present at the same time, and who, as well as Robert Harvey, attested the will in the presence of the deceased.

[*Per curiam*: "In this case, the person who signed the testator's name at his request, was one of the witnesses who attested the execution of the instrument; all that the act requires is, that the will shall be signed by the testator, or by some person for him, in the presence of two witnesses, who shall attest the same; there is nothing which prevents the person making the signature for the testator, being one of the witnesses to attest and subscribe the will. I am of opinion that this is a good execution under the statute."

[*In the goods of Sarah Ullersperger (s).* In this case the subscribing witnesses signed in each other's presence, and in that of the testatrix, who desired one of them to sign for her. The witness signed *her own* name where the testatrix bid her sign.

[*Per curiam*: "It has been held(*t*), that the person signing for the testator may be a subscribing witness; in that case, the testator's own name was written by witness; but I think this falls under the principle of that case, and I shall grant the prayer of the motion.

[*In the goods of Allen (u).* The deceased signed her will by a mark, in the presence of one witness, who subscribed the will as attesting it; and on a subsequent day she acknowledged her signature in the presence of that witness and of another, who also subscribed the will; but the former witness did not again attest it. The court refused to grant probate of it.

[But on a subsequent occasion, the court intimated that it might be well open to argument, whether this *acknowledgment in the presence of both witnesses*, who had signed separately, was not sufficient; and reminded counsel that this case of *Allen* had by no means the force of a decision given after hearing arguments on a will formally propounded.

[*In the goods of Eleanor Bryce (v).* A testatrix signed her will with a mark, her name not appearing: it was held to be a sufficient signing under the act, and probate was granted.

[*In the goods of Mary Warden (w).* Testatrix signed her will, and on a subsequent day sent for two witnesses to attest it. Upon their arrival, they said that they were come for the pur-

(*r*) [1 Curt. 914.]

(*s*) [Jurist, vol. vi. 268.]

(*t*) [*In the goods of John Bailey*, 1 Curt. 914.]

(*u*) [2 Curt. 331.]

(*v*) [Ibid. 325.]

(*w*) [Ibid. 334.]

pose of signing their names as witnesses to her will, which was then produced; upon which the testatrix said, "I am glad of it, thank God." It was held to be a sufficient acknowledgment under the act. Cases decided under Sect. 9.

[*In the goods of James Clarke (x)*. The testator, being too ill to sign his will, requested the drawer of it to sign it for him, which he did in his *own name*, and not in that of the testator, as follows:

[“ Signed on behalf of the testator, in his presence, and by his direction, by me,
C. F. Furlong,
Vicar of Warfield, Berks.

[“ The above signature was made for and acknowledged by the testator, in the presence of us whose names are hereto subscribed.

Mary Butler X her mark.
Ann Clark.”

[*In the goods of Ann Rawlins (y)*. The deceased signed her will, not in the presence of witnesses; and subsequently producing it before two witnesses, said to them ‘Sign your names,’ which they did; it was *held not* to be an *acknowledgment* of her signature and probate was refused.

[*In the goods of Woodington (z)*. The testatrix concluded her will—“ Signed and sealed as and for the will of me, C. E. F. Woodington, in the presence of us,

Thomas Hughes.
Ellen Hughes.”

[The will was held to be good.

[*In the goods of George Lessant Olding (a)*. “ The peculiarity attending this case was the manner in which the testator had interpreted the 9th section of the Will Act, which orders wills ‘ to be signed at the foot or end thereof by the testator.’ On the day of execution of will, attesting witnesses being both present, deceased took up will, (previously written by his wife from his own dictation), and read the same all over aloud, in the hearing of those present; and having so done, requested witnesses to attest the same, telling them, they had better sign their names at length. They, thereupon, attested and subscribed the said will in the presence of the testator; *after which* the testator signed his name at the foot or end thereof, in their presence. Affidavit was made to this effect by one of the subscribing witnesses. The signing was as follows:—

‘ Signed, sealed, and delivered, in the presence of us, this 17th September, 1841,—

(Seal)	‘ Martha Heriot, 93, Gloucester-place.
(Seal)	‘ Mary Sercombe, 81, Bishopgate-street.
(Seal)	‘ G. L. Olding, 81, Bishopsgate-street.’

(x) [2 Curt. 329.] (y) [Ibid. 326.] (z) [Ibid. 324.] (a) [5 Jur. 1017.]

Cases decided
under Sect. 9.

So that the two witnesses signed *first*, and the testator *last*, the names being written in a row, one below the other: this being the deceased's idea of the injunction contained in the 9th section of 1 Vict. c. 26.

[The Court.—“ It really seems as if the will had been so signed for the very purpose of raising a difficulty. Is it a will under the act *before* the signing by the testator? Have you found any analogous cases under the statute of frauds?

[Finally,

“ The court refused to decide the question on a mere *ex parte* motion, intimating, that it should be regularly propounded, in order to obtain the judicial opinion of the court.”

[*In the goods of Judith Wakeling (b)*. “ The testatrix had made her will on one side of a sheet of paper; it covered almost the whole side, *but there was sufficient room left for her signature*. The solicitor who prepared the will, told her to sign her own name at the bottom, remarking, that the *witnesses might sign in the margin*. It was proved that she was perfectly aware of the provisions of the New Will Act, and thought she had complied with them when she signed her name in the *margin*; as did also the attesting witnesses. The will, in fact, was written thus :

Names of testator and witnesses.	
	Body
	of Will.

There was an affidavit of one of the attesting witnesses, that the will was complete at the time of her signature. Under these circumstances,

[*Per curiam* : “ The Will Act requires that the signature shall be ‘ at the foot or end thereof;’ the testatrix has, in this case, signed in the margin. It is most distressing to the court to be obliged continually to work, as it does in this case, an absolute defeasance of the intentions of the testatrix. Undoubtedly, the meaning of the provision for signing at the foot or end was, to guard against signing at the beginning of the will, which was not provided against by the statute of frauds. Still, the words of the New Will Act seem imperative upon the court. It is most distressing to me, but I must reject this *motion* as it now stands; the will must be propounded, if it is intended to contend for its validity.”

[“ *In the goods of William Carver (c)*. William Carver, of Charlton, in the county of Kent, died, having made his will, bearing date the 19th October, 1840, and appointed two executors. He left a widow and several children. The will was a holograph, and was written on the front or open part of *two*

(b) [5 Jurist, 1164.]

(c) [6 Jurist, 40.]

sheets of paper. The writing covered the paper, close down to the end of the second sheet, so as not to leave room for his signature, and that of the attesting witnesses; the testator had, in consequence, written on the *third* or back of the second sheet, the words, 'Signed and sealed this nineteenth day of October, 1840,' and then executed the will by signing his name, 'William Carver,' in the presence of two witnesses, who, afterwards, in the presence of the testator, and of each other, subscribed their names.

[“The Court.—The will is written on a printed paper of instructions for making wills, conformably to the new act, which printed papers frequently mislead testators. The will is in paragraphs. At the bottom of the second side is the last paragraph, where it would certainly have been the usual course to have signed the same; but the testator has written an attestation clause, and signed his name at the bottom of the third sheet. On the whole, I am satisfied that the provisions of the New Will Act have been complied with; perhaps, it is hardly ‘at the foot,’ but it is ‘at the end.’—Probate granted.”]

[In *Pechell v. Jenkinson* (d), an unattested codicil, without date, to a will dated 5th June, 1830, the testatrix dying 20th January, 1839, was pronounced for, the case being bare of facts, and there being nothing to show that the codicil had been signed since the new act had come into operation.

[In the goods of *Thomas Howell* (e), who died on the 7th of April, 1839, leaving a will dated the 27th of March preceding, signed by him, and attested by three witnesses. The will concludes thus, “declaring this to be my last will and testament, on the day and year first before written.

[“Signed, sealed, and declared by me, the testator,
Thomas Howell, (L. s.)
in the presence of us,
at his request, and in the
presence of each other as witnesses.

“Christopher Brown.

“Jonas Hunt.

“Jasper Taylor.”

“And I hereby appoint Messrs. Bradford and Burt of Swinden, and Jonas Hunt, executors.”

[The whole of the will, including the appointment of the executors, was written before the deceased signed it; it was all read to him, and he afterwards signed it, and it was attested by the witnesses.

[Sir Herbert Jenner: The appointment of the executors is after the name of the testator. If that is part of the will, the signature is not at the foot or end of the will, as required by the statute; the court has no discretion, but must deal with this addition in the same manner as if it had been a bequest of the residue or of real estate.—Motion rejected.

(d) [2 Curteis, 273.]

(e) [Ibid. 343.]

Cases decided
under Sect. 9.

[The court subsequently allowed administration with the will annexed to pass to the residuary legatee, without the clause appointing the executors, upon their consent.

[In *Newton and Thomas v. Clarke* (f), a testator intending to execute a codicil signed the same while lying in bed, there being present in the room the two witnesses who attested the codicil; *the curtains at the foot of the bed being drawn at the time* (g), one of the witnesses could not actually see the testator sign his name, nor could the testator see that witness subscribed the codicil as attesting it: it was held that the testator and witnesses signed their name *in the presence of each other*, as required by the act.]

[In *the goods of Ellis* (h). The deceased, a barrister at law, who died on the 21st of April, 1840, a bachelor, possessed of personal property to the amount of 18,000*l.*, shortly before his death gave instructions for a will, which were taken down in writing from his dictation, by his uncle, whereby he bequeathed a legacy of 1000*l.* to each of his three sisters, and the residue to his brother. The deceased having remarked that there must be two attesting witnesses to the will, his uncle waited till the physician came, when the deceased signed the paper in the presence of the witnesses, who, unfortunately, previous to affixing their names to it, took the paper into another room, separated from the deceased's bed-room by a passage, both doors being open, so that the witnesses could hear the deceased breathe, but could not see him, nor be seen by him.

[The court said, that it was a very hard case, but the court had no discretion under the act, which is imperative, and no consents would do. If the execution is not attested in the deceased's presence, actual or constructive, the court must refuse probate. In this case, the witnesses admit that they attested the paper in a room where they could not have been seen by the deceased, and could not see him.—Motion rejected.

[In *Young and Smith v. Richards* (i), one of the two attesting witnesses having deposed that the will was attested in the presence of the testatrix, and the other that it was not, the court refused to rescind the conclusion of the cause for the purpose of re-examining the attesting witness, but afterwards did so for the purpose of examining other witnesses who were present at the time.

[In *the goods of Johanna Kiernan*. A will without date was pronounced for, the paper being a holograph in the handwriting of the deceased, and found in a diary of 1835. Feb. 20, 1841.—In *the goods of Samuel Vidler*, an unexecuted will, dated two days before the act came into operation, was

(f) [2 Curteis, 320.]

(g) [In *Tod v. Winchelsea*, 2 Car. & P. 491, Lord Tenterden held that it was not absolutely necessary that

the testator should see the witnesses, for he might be blind.—Ed.]

(h) [2 Curteis, 395.]

(i) [Ibid. 371, 372.]

pronounced invalid, the testator having said, two days before Jan. 1, 1838, that he meant "to have it done in a proper manner." Feb. 20, 1841.—*In the goods of Elizabeth Thomas*, there was a want of recollection of attesting witnesses as to their joint presence at the time of execution. The will purported to have been executed in the presence of Eliza Thyer and Margery Day; but in their affidavit the former remembered the execution of the codicil, and her attestation of it in the presence of the deceased, but according to her recollection and belief the other subscribed witness was not present at the execution; and the other witness (Day) deposed that "she has no recollection whatever of having been present at, or of the circumstances attending, the execution of the codicil." Adams, D., moving for probate, submitted that the want of recollection of these persons ought not to defeat the intention of the testatrix. Sir H. Jenner said, "The question is, whether the paper was signed in the presence of witnesses present at the time, and was subscribed by them in the presence of the testatrix. We have had such experience, in the court and in the registry, of wills improperly attested, which amounted to no attestation, that, unless the court laid down and acted upon the rule (of requiring affidavit of the fact, where the clause of attestation does not expressly state that both witnesses were present at the time of execution), it would grant probate of papers in common form sometimes in the face of the act. The rule may in some cases lead to serious inconveniences, but what can be done? What would have been the course pursued by a court of law, in such a case, before the late act, as to a will of real estate? This is a provision intended to prevent fraud, and to protect property generally, though in individual cases it may inflict great hardship. In the present case, it is quite clear that it was the intention of the deceased to revoke the bequest of half the residue, and to give it to another person; and if the codicil is not entitled to probate, her intention will be of no effect. I must reject the motion, and leave the party to propound the paper."

[Nov. 14 (k), 1840.—*In the goods of Thomas Fisher*. In this case a paper attached to a will was not permitted to be included in the probate of the will. The testator died on the 7th October, 1840, leaving a will dated the 17th July, 1839, duly executed, consisting of several sheets of paper. Attached to the final sheet, by sealing-wax at three of the corners, was a

(k) [Cases with the date and without reference are not yet reported, and were decided since the publication of Dr. Curteis's last volume of Reports, which reach to December, 1840, and before cases at Doctors' Commons, which begin November 2,

1841, were reported in the Jurist. The editor has collected these cases partly from his own notes, and partly from some reports in the Monthly Law Magazine, and printed "Notes of Cases in the Ecclesiastical Courts." —ED.]

Cases decided
under Sect. 9.

sheet of foolscap paper, containing an inventory of some articles of furniture, of comparatively trifling value, with the names of his children, amongst whom they were distributed. In the will was the following passage: "And I give to all or such of my children as shall be then living, the articles of furniture which will be enumerated or described in a paper in my own handwriting, and will be found at the time of my decease, and which will bear date subsequently to this my will, and which I do not annex to this my will, in order that I may alter it from time to time, as circumstances may require." The paper writing found attached to the will was in the testator's writing; it commenced thus: "Begun May 9th, 1838: finally closed July 17th, 1839;" and it ended thus: "signed with my hand, Thos. Fisher. Begun, dated September 15th, 1838; finally closed July 17th, 1839," being the date of the will; it was signed not only at the end, but also in the margin of the first and second sides, but was unattested. The will was found sealed up in an envelope in an iron box, in which the testator kept his papers. The testator's solicitor who prepared the will, and attested the execution, had the paper in question in his possession whilst the will was in preparation, and deposed to the presence and production of the paper at the execution of the will, and to his belief that it was then signed, though he could not speak positively to this point, nor could he or the other attesting witness depose whether the paper was then attached or not.

[*Per curiam*: "No person could say that the paper was attached at the time of the execution of the will, and it is clear that it must have been afterwards. It does not follow that the words, 'finally closed 17th July, 1839,' were written at the time; indeed the ink appears to be different. I cannot hold, under the act, that it is a part of the will. It is an addition to it. I cannot think the attestation sufficient; it might be if it had formed a part of the will, *or if there was evidence of its being attached to the will, at the time of execution.* The will itself is executed according to the statute, and it refers to a paper, but not in the attestation clause, which does not say that the paper was attached to the will."

[Jan. 15, 1840.—*In the goods of Thomas Barry.* The testator died 9th August, 1840, having executed a will, dated 26th June, 1838, and a codicil, dated 1st June, 1839. After his death, there was found, tied up with the will and codicil, which had been deposited in the custody of one of the executors, a paper, signed by the deceased, being a schedule or memoranda of certain articles, which paper was referred to in the will, and the paper itself purported to be the paper "alluded to in my will." The attesting witnesses to the will (three in number) could not recollect whether the deceased called their attention to this paper when the will was executed.

[*Per curiam*: “I am of opinion that this paper was signed *before* the will, for I observe that some ‘candle-cups’ mentioned in it are said to be ‘already delivered.’ But I could not determine that this paper has been incorporated with and made part of the will, on motion, in the absence of the residuary legatees. My strong inclination is, that I cannot sustain the paper: a paper merely referred to in a will, and found in it, is not necessarily a part of the will.”

[June 9, 1841.—*In the goods of Jane Sotheron*. Certain instructions to executors, referred to in a will of posterior date, but not attested according to the act, were not admitted to probate as part of the will.

[*Per curiam*: “The act requires that a will or codicil shall be signed at the foot of the paper by the testator, in the presence of two witnesses present at the same time, who shall attest the same in the presence of the testator. I am not aware of any case in which the court has gone the length of holding that a paper referred to in a will shall form part of the will. Where there has been a codicil, executed as a codicil before the date when the statute came into operation, the court has held its republication sufficient in the presence of witnesses, when referred to in a document of subsequent date. But here the paper is dated in December, 1839, consequently after the act came into operation, and it is not signed in the presence of witnesses. I cannot see how the court can say that this is a part of the will, and decree probate of it. It is not executed in the presence of witnesses; it is produced to one of the subscribed witnesses to the will, but it is not produced to any other witness, and he does not attest it. I must reject the motion.”

[But these decisions are perhaps, in some measure, modified by the case of *In the goods of the Countess of Durham* (l). Testatrix died in 1841, and made her will, (according to the provisions of the act), in 1840, in which she recited her husband's *last* will appointing her sole executrix and residuary legatee, and then, in the event of certain contingencies, she referred to a *former* will by her husband, which was still in existence, and expressed her wish that it should operate as her will. She made her will in London, and the will referred to was in the country, so that it could not be said to have been attached to her will at the time it was made. Several instances were cited of similar cases under the Statute of Frauds, but the one chiefly relied upon, and which had most weight with the court, was that of *Smart v. Prujean* (m). It was argued, (1) that the chief requisite, *the identification* of the paper, was complete in this case, (2) and that the document referred to was in existence *before* the will was made. The court granted probate of this paper.

(l) [Jurist, vol. vi. 268.]

(m) [6 Ves. jun. 565.]

[*In the goods of Frances Sell* (July 8, 1841.) Unattested additions following the signature were excluded from probate.

Section 11.

[Sect. 11 enacts, "*That any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this act.*"]

Section 12.

[Sect. 12 enacts, "*That this act shall not prejudice or affect any of the provisions contained in an act passed in the eleventh year of the reign of his majesty King George the Fourth and the first year of the reign of his late majesty King William the Fourth, intituled 'An Act to amend and consolidate the Laws relating to the Pay of the Royal Navy,' respecting the wills of petty officers and seamen of the royal navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize money, bounty money, and allowances, or other monies payable in respect of services in her majesty's navy.*"]

Cases decided under.

[*In the goods of Richard Hayes* (s). Probate was allowed of an unattested codicil made at sea by a *purser* of a man of war, as falling under the exception contained in the 11th section. The court cited the case of a nuncupative codicil made by Lord Hugh Seymour, the admiral of the station off Jamaica (t). Sir H. Jenner said, "I incline to hold that the codicil in question falls within the exception contained in the 11th section of the act, as being that of a 'seaman at sea.' I am of opinion, according to the construction of the term given by Sir William Wynne, and according to the reason of the thing, that the term 'mariner or seaman' does not exclude any person in her majesty's navy, though superior officers of the ship, being 'at sea,' from the exception contained in the act."

[*In the goods of E. J. Long* (u). The will of a seaman who went *on shore* and there died by an accident, was allowed to pass as that of a seaman *at sea*, under section 11.

[*In the goods of John Johnson* (x). A major in the 13th regiment of foot embarked from India for England, and died in the voyage home; while in India he executed a will, which was attested by two witnesses; but it did not appear from the attestation clause that the witnesses were present at the same time, and there was no affidavit to that effect; while on board ship he executed a codicil duly attested, in which reference was made to his will. The court granted probate, as it should appear, on the double ground that the presumption must be, nothing appearing to the contrary, that the requisitions of the

(s) [2 Curteis, p. 338.]

(t) [*Earl of Euston v. Lord Henry Seymour, by his guardian*, Prerog. Court, 21st July, 1802, Sir William Wynne rejected it on the ground of

its having been made on shore, and therefore not "at sea."]

(u) [2 Curteis, 373.]

(x) Ibid. 341.]

statute had been complied with, and that he was "a soldier in actual military service," under section 11 of the act.

[*In the goods of Hugh Donaldson, M. D.* (y) The 11th section of the act was held to include a surgeon in the East India Company's service, the court observing, that, as the privilege of mariners was extended to merchant seamen, by parity of reasoning persons in the military service of the East India Company must be considered as soldiers (z).

[*In the goods of C. E. Phipps* (a). The deceased was a lieutenant in the 76th regiment of foot, stationed at Demerara, where he died, 26th June, 1839, a bachelor, leaving a father. After his death, a testamentary writing, in the form of a letter to his solicitor, written by the deceased while on military service at Berbice, was found amongst his papers, dated 28th January, 1839, but unattested. It was stated at the War Office, that the deceased would be considered as in actual military service. Sir H. Jenner said, "I understand there have been two cases (b) in which probate has passed in common form, upon affidavit that the deceased was a soldier in actual military service. I am not prepared to say that our regiments in the colonies, or in garrison at home, are in actual military service. I cannot think that it was the intention of the legislature to except every officer, under such circumstances, from the operation of the act. Under the peculiar circumstances of this case, considering that the party deceased was with his regiment, and in the opinion of the War Office, in actual military service at the time, I shall allow probate of this letter to pass. It is under the peculiar circumstances of this case that I do so, nor should I do it, but that the father, who prays probate, is the person who would be entitled to the whole property if his son is dead intestate, and there is no person against whom the paper could be propounded."

[Sect. 17 enacts, "*That no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.*" Section 17.]

Munday and Berry v. Slaughter (c). This was a cause of proving the will of Thomas Chitty, who died in June, 1838, leaving both real and personal estate; of the will, executed on the day of his death, there were three executors, who were also residuary legatees. The will was propounded by Munday and Berry, two of the executors, and was opposed by

(y) [2 Curt. 387.]

(z) [See also, *In the goods of Foy*, ibid. 328.]

(a) [2 Curteis, 368.]

(b) [Probate in the two cases referred to passed upon an affidavit

from a clerk in the War Office, that the parties deceased were, at the time their wills were made, in actual military service.]

(c) [2 Curteis, 72.]

Emily Slaughter, one of the next of kin: Henry Butterfield, the other executor, renounced his executorship on the 21st of November, 1838, but the proxy of renunciation was not recorded until the 3rd of December. He likewise, on the 21st and 22nd of November, conveyed by lease and release of the realty and assignment of the personalty, his share of the residue, to "Mr. John Munday, his heirs and assigns for ever, to the only proper use and behoof of the said John Munday, his heirs and assigns, for ever," for the purpose of becoming a witness in support of the will: his competency as a witness was objected to. The court held, first, that the proxy of renunciation took effect from its date; and secondly, that supposing the renunciation to be invalid, that as the interest under the will was conveyed by the deed of gift, the party was a competent witness under the 17th section.

Sections 18
and 19.

[Sections 18 and 19 enact that wills shall be revoked by marriage and not by presumption.

Section 20.

[Sect. 20 enacts, "*That no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same, by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.*"

Cases decided
under Sect. 20.

[*Hobbs v. Knight* (d). A party duly executed a will in 1835, and after the 1st of January, 1838, cut therefrom his signature; it was held, first, that the effect of such act was to be considered with reference to the provisions of the statute, the 34th section enacting "that the act shall not extend to any will made before 1st January, 1838," not applying to any act done to a will after that date; secondly, that the cutting out the signature amounted to a revocation of the will under the terms "tearing or otherwise destroying the same," in the 20th section of the act.

[*Stephens v. Taprell* (e). This was an allegation propounding, by direction of the court (f), a paper as the will of Mr. Edward Stephens, a solicitor at Bristol, who died 15th March, 1840, leaving a son and daughter, and personal property to the amount of about 25,000*l.* The paper in question, which was in the deceased's handwriting, signed by him, and attested by two witnesses, when found, a few days after his death, locked up in his office, was in a cancelled state: the body of the will was struck through with a pen, the name of the testator was crossed out, the attestation clause, and the names of

(d) [1 Curteis, 768.]

(e) [Ibid. 458.]

(f) [On motion, April 23, 1840.]

the witnesses were likewise run through with a pen, and what had been intended for a codicil, but which was not legally executed, was also cancelled with a pen. The judge, after hearing counsel on both sides, and considerable deliberation, pronounced that such cancellation was *not* a revocation under the words “otherwise destroying,” of the statute.

Cases decided
under Sect. 20.

[*In the goods of John Wilson (g)*. The testator in this case died on the 5th of February last. On the 20th of January, 1840, being ill, he gave instructions to a solicitor to prepare a will, which he executed the same day. Having after execution discovered that he had omitted a legacy, he directed his solicitor to prepare a codicil to supply the omission. The solicitor suggested that it would be better to make a new will, which was done, and it was executed on the 21st of January; consequently the will of the prior day was revoked. On the 4th of February, being desirous to bequeath other legacies, he directed a codicil to be prepared, which he attempted to execute, but failed through weakness, and on the 5th of February, the day of his death, he had a new will prepared, but the person who prepared it unfortunately took for his guide the will of January 20, instead of that of the 21st, so that the legacy, to include which the latter was expressly made, was omitted.

[The court was moved that the two papers might be admitted to probate as together containing the will of the deceased, it being clearly his intention that the bequest should stand; but

[Sir H. Jenner was of opinion, “that he could not admit to probate a paper that had been revoked, and there was no other mode of supplying the omission.”

[*In the goods of Francis Lambert (h)*. The deceased, Mr. Francis Lambert, of Coventry-street, goldsmith, died the 2nd of February, 1841, leaving a considerable personal estate. In 1835 his solicitor received instructions from him to prepare a will; and he prepared a draught will, and afterwards, in March, 1836, another draught, and left a fair copy of the draught (filling nineteen sheets of paper) with the deceased for his approval. In August, 1836, the deceased produced this draught as his will, and had the same attested, and in July, 1837, having made certain alterations, he had them likewise attested, and spoke of having a will prepared, but stated that if he should be prevented, the draught was executed as his will. After his death, this draught will was found carefully preserved in a box, but a part of the first sheet was cut away. There was no evidence when this was done, and the question was, as to the form of the probate, whether as the will now stood in part cancelled, or as it originally stood with the legacies contained on the portion cut out.

(g) [August 3, 1841.]

(h) [August 3, 1841.]

Cases decided
under Sect 20.

[Sir H. Jenner was of opinion, "that it was immaterial when the act was done, since, according to his construction of the 20th section of the Will Act, a will may be revoked in part by burning, tearing, or otherwise destroying, and he had held that the cutting of a will was a destruction within the meaning of the statute, if done, as in this case, with the intention of revoking. He therefore decreed probate without the portion cut out, as it was to be presumed, by the deceased himself, with the intention of revoking those legacies."

[*In the goods of Alfred Shirley* (Jan. 15, 1841), the court held, that the marriage of a testator after the date of a will executed prior to the late act, did *not* revoke it; but the court expressed its regret that this decision was on an *ex parte* motion, and without the advantage of hearing counsel on the other side.

[*Crump v. Berry and another*. This was a question respecting a codicil propounded as part of the testamentary disposition of Ellen Vole, spinster, of Bewdley, who died at Cheltenham, 1st June, 1840, aged sixty-nine. On her death, her executors proved a will dated in 1830, and three codicils, dated in 1840. They were afterwards called upon to prove the codicil in question, which was dated in November, 1833, and by which the testatrix gave her interest in certain premises, of which she was mortgagee in possession, to the widow of a deceased cousin. This paper was deposited in a trunk, containing plate and other articles of value, left with a friend of the testatrix, at Bewdley, when she went to Cheltenham, in May, 1840, and when found, it had the date of the year, the month, and the name of the testatrix, carefully obliterated by being run through with a pen. The paper was attached to the deed of mortgage. The deceased had allowed Mrs. Crump (the legatee named in the codicil) to live on the premises rent-free, except for one half-year, in 1834, for which she paid rent. The question was, whether the cancellation took place before or after the Will Act came into operation; the court observing, that no inference could be drawn from the circumstances, and that therefore it must hold, as in *Pechell v. Jenkinson*, that the party knew what the requisites of the law were; and then advertng to the fact that the deceased had deposited her will in a different place from the codicil, said the presumption was, that the cancellation was made *animo revocandi* before the Will Act came into operation.

[*In the goods of Frederick Brown Colberg* (June 19, 1841). The will was made by testator, September 3, 1840; he subsequently tore it; but an affidavit was made to prove that he did so in a fit of momentary rage, and repented of the act, and declared that he did not mean it to be a revocation: it was argued, that not being torn *animo revocandi*, it did not fall

under the act. The court said it was a *prima facie* revocation; that although the motion was unopposed, there must be a decree taken out against the next of kin, or a proxy of consent from them before probate was allowed to issue.

[The 21st section enacts, "*That no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.*" Section 21.]

[*In the goods of John Livock (g).* The deceased left a will, dated 22nd February, 1837, in which there had been a legacy of three or five hundred pounds to John Bennett; in March, 1838, the deceased erased the word three or five, (whichever it was,) and inserted the word one. This alteration was not attested as required by the section given above. Sir Herbert Jenner: It is impossible to maintain that the word one, which has been substituted, can stand. The 34th section is also worthy of consideration, which declares that the act shall not extend to wills made before the 1st of January, 1838; now, the interpretation which the court puts upon this clause is this, that the act shall not extend to any will made between the passing of the statute (the 3rd of July 1837) and the 1st of January, 1838, but that in any alterations made after January, 1838, to wills previously executed, the requisites of the act must be complied with. Probate to pass of the will in blank without the word one. Cases decided under Sect. 21.]

[*In the goods of James Beavon (h).* The testator, after the execution of his will, having partly erased the word "four," and substituted the word "five," the alteration not being attested, probate of the will passed as it originally stood, the word *four* being sufficiently apparent upon the paper. *In the goods of Sir Charles Ibbetson (i),* obliterations and erasures had been made after the execution of the will: the court ordered them to be carefully examined by persons accustomed to inspect writings: probate eventually passed with the parts destroyed *in blank*, as the original words could not be decyphered.]

[*Brooke (formerly Reeve) v. Kent.* The Prerogative Court of

(g) [1 Curteis, 906.]

(i) [2 Curteis, 337.]

(h) [2 Curteis, 369.]

Cases decided
under Sect. 21.

Canterbury, on the 13th February, 1840, rejected an allegation propounding and praying probate of the will, as it originally stood, of Mr. William Brooke, who died on the 28th of June, 1839, the will bearing date the 15th of July, 1837, with a codicil dated the same year. By the will (which disposed of real and personal estate, and was executed in the presence of three witnesses) the testator empowered each of the persons made tenants for life of his real estates thereby devised, to appoint to the use of any woman he might marry, for her life, as her jointure, 200*l.* a year, issuing out of the said estates. The allegation given in by Mr. John Brooke (heretofore Reeve), one of the executors, against the other executor, pleaded that on the 26th of June, 1838, the testator, with a knife, erased this amount of annual jointure, and altered the sum to 100*l.*, writing under the clause of attestation, at the end of the will, a memorandum of what the alterations were (*m*), and signing the same; but they were not attested (agreeably to the new act). The allegation exhibited the draft of the will, containing the words as they originally stood. The judge (in the court below) held that, although nothing could be more clear than the intention of the testator—namely, to reduce the annual charge upon his estates for jointure from 200*l.* to 100*l.*—yet the alteration, not being executed in the presence of two witnesses, was void under the 21st section of the act, “except so far as the words or effect of the will before such alteration was not apparent;” and the testator having erased the words so as to render the original sum not apparent, he could not pronounce for either, the court not being at liberty to admit other evidence than appeared on the face of the will itself. The case was appealed to the judicial committee of the Privy Council, which reversed the judgment of the court below. Dr. Lushington delivered their Lordships’ (*n*) judgment. And after discussing the objects of the new act, and the alterations effected by it in the testamentary law of this country, he read the 20th and 21st section of the statute, and observed, “The first point for consideration as to this section is, whether ‘intention’ must not accompany the acts, in the same way as it must accompany the acts mentioned in the 20th section. Unless this construction be given to the 21st section (as it must necessarily be applied to the 20th) some very absurd consequences might follow. Burning or tearing a will, without intention to revoke it, would not revoke the instrument, or any

(*m*) [“The erasures in the twenty-third line of the sixth sheet, the word ‘two’ taken out, and the word ‘one’ put in its place; and in the first line of the seventh sheet, the word ‘four’ taken out, and the word ‘two’ put in its place; and in the fifth line of the seventh sheet, the word ‘four’ taken

out, and the word ‘two’ put in its place,—by me, William Brooke, June the twenty-sixth, one thousand eight hundred and thirty-eight.”]

(*n*) [Mr. Baron Parke, *Ld. Denman*, *Ld. Brougham*, *Dr. Lushington*.]

part of it; but obliteration, without intention, might render ineffectual the most important part. The legislature never could mean that intention should be indispensable to give effect to burning or tearing, and not to obliteration with ink, or something similar. In all these cases, under the statute of frauds, and under this act, *intention* then is indispensable. Under the former statute, to burn, or to tear, or to obliterate, a part of a will, was altogether a nullity, if such act was done *sine animo revocandi*, and only for the purpose of making immediately some new disposition or alteration; and if from want of compliance with the statutory regulations such new disposition or alteration could not take effect, then the burning, tearing, or obliteration, in no degree revoked the will, but it remained in full force, as if nothing had been done to it. Similar principles must be applied to cases under the present statute: there is nothing in the statute which tends to a contrary conclusion. Then how is the intention of the testator to be ascertained in this and other similar cases? Precisely by the same rules of evidence which were applied to wills whilst the statute of frauds was in force—the same evidence that was received in *Bibb v. Thomas* (o) and *Onyons v. Tyrer* (p), and in all the subsequent cases. In the present case there is abundance of proof (assuming the facts stated in the allegation to be true) that the testator did not intend to revoke absolutely; he meant to revoke by substituting different sums for those originally devised. The alterations cannot take effect, because they are not executed according to the statute. Therefore, in conformity with the old established principles, and a long train of decisions, the revocation is ineffectual, and the will must stand in its original state. The handwriting of the testator, and the paper intended for a codicil, establish all the necessary facts on which to found this conclusion. The effect of this is, that their lordships agree with the court below in considering this case to fall within the statute; but they conceive that the point to which I have more particularly adverted was not directly brought under the consideration of the learned judge, namely, that this was not an absolute revocation, but merely an intention to revoke by substituting an alteration. The learned judge in the court below rejected the allegation pleading the facts and requiring probate of the paper in its original state. Their lordships are of opinion that they must reverse the decree of the court below, admit the allegation, and reject the allegation given in in this court, retaining the cause (q).”

[In the goods of William Green (r), the court ordered a

(o) [2 W. Black. 1043.]

(p) [1 P. Wms. 345.]

(q) [The facts being admitted, their Lordships decreed probate of the will

in its original state,—all costs to be paid out of the estate.]

(r) [August 3, 1841.]

motion to stand over, to see whether the words in the original will could be deciphered; observing that “afterwards the *court may have to determine whether* it can supply illegibilities *aliunde*; the decision of the Privy Council having established *only* that where there is a *contingent* revocation, matter *aliunde* may be referred to, here there was an *absolute* revocation.”

[Wherever the case is bare of circumstances the court will presume that the party knew what the requisites of the law were (*r*). But where the motion to grant probate of a will with unattested alterations is opposed, the court will leave the party to propound the will, and not pronounce for it on motion (*s*).

[*In the goods of W. Stratton*, alterations unattested in a will were afterwards ratified by a codicil as follows: “And in all other respects than as aforesaid I do hereby ratify and confirm my said will.” Sir H. Jenner said: “It seems to me that where a codicil is executed after alterations made in the will, at the request and in the presence of the testator, and he proceeds to execute the codicil, it is in fact a republication of the will. I incline to think that that is the proper construction of the act. I should not, without argument, lay it down as a precedent; but where the codicil ratifies and confirms the will, I incline to hold that it is ratified and confirmed as it stood at the time the codicil was executed. I do not mean to confine myself in future cases; but in this case, decree probate of the will as it now stands.”

[Several other cases (*t*) of obliterations, &c. have been decided by the Prerogative Court, but they all fall under the principle of the foregoing decisions. It should be observed, as a point of practice, that the court will not allow any motion upon papers of this description to be made to it in the *alternative* (*u*), that is to say, to grant probate with or without the alterations; a specific motion must be made to it.

(*r*) [*Pechell v. Jenkinson*, 2 Curt. 273; *Crompt v. Berry*, &c. Jan. 20, 1841; and *In the goods of Baron Henley*, Feb. 11, 1841.]

(*s*) [*In the goods of George Jackson*, June 29, 1841, and of *John Ferguson Smith*, April 26, 1841.]

(*t*) [*In the goods of Rippin*, 2 Curt. 332; of *Johanna Kiernan* and of *Maria Susannah Baylis*, Nov. 14, 1841; of *Lord Henley*, Feb. 11, 1841; of *Richard Coles*, Nov. 14, 1840—left a will dated 1833, a codicil unattested; court pronounced for the pre-

sumption that both were executed before 1838; of *W. Stratton* and of *Sophia Clavell*, March 16, 1841; of *C. Hawkins* and of *H. Lissett*, April 19, 1841; of *George Hartley* and of *Frances Snell*, July 8, 1841; of *A. E. Phillips*, May 12, 1841; of *Dyer*, 4 Jurist, 1016. Sometimes a watermark is held to be a presumption of the date. *In the goods of Taylor*, 5 Jurist, 1041.]

(*u*) [*In the goods of Parke*, July 8, 1841.]

V. *Of the Probate of Wills, and Administration of Intestates' Effects.*

Which chapter divides itself into two parts ; viz.

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1. *Of the Probate of Wills.*

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It appears to have been a matter of great controversy to whom the probate of wills and granting administration did originally belong, and whether these were matters entirely of ecclesiastical cognizance; but it seems now to be the better opinion, that the probate of testaments did not originally belong to the ecclesiastical jurisdiction, but to the county court, or to the court baron of the respective lord of the manor where the testator died, as all other matters did (x).

The truth is, there were wills before there was any ecclesiastical jurisdiction; and consequently the cognizance thereof pertained then solely to the civil magistrate. After the establishment of Christianity and of the ecclesiastical jurisdiction in England, until the time of the Conquest, the courts ecclesiastical and temporal were conjoined, the bishop and earl sitting together for the transaction of business in the county court. Upon the separation of the courts in the time of King William the First (y), it doth not appear unto which of the two jurisdictions the cognizance of wills immediately acceded. But so early as the reign of King Henry the First, Sir Henry Spelman observes that in Scotland the cognizance of wills belonged to the ecclesiastical jurisdiction; and he adds, doubtless then also in England. And Glanvil doth testify thus much in the time of King Henry the Second; who saith, that if there be any dispute concerning a testament, the same is to be heard and determined in the Court Christian (z).

And in the preamble of the statute of the 18 Ed. 3, stat. 3, c. 6, it is expressed that *causes testamentary notoriously pertain to the cognizance of holy church.*

(x) 2 Bac. Abr. 398. [Exors. (E.)] (z) Spelm. Rem. 132.
 (y) See title Courts.

Origin of the
Jurisdiction.

Nevertheless, from the constitutions and laws which were made of ancient time against lords of manors detaining the goods of the deceased in prejudice of their creditors, of their families, and of their souls, it seemeth that the lords of manors did for some time retain a jurisdiction with respect to the goods of their deceased vassals. And from this source possibly may be deduced the power of granting probate of wills and administration of intestates' effects that still remaineth in divers manors. Which power having been enjoyed time out of mind, and without interruption, is allowed to be good. And where the lord of a manor hath the probate of testaments within his manor, if such will be proved in the ecclesiastical court, a prohibition lieth; because the jurisdiction thereof belongeth to another; else the party might be doubly vexed (*a*).

The granting of probates of wills regularly belongs to the ecclesiastical courts; but some courts baron have this right by prescription, as the manor of Mansfield, and those of Cowle and Caversham in Oxfordshire (*b*).

But, excepting in such like particular cases, it is now certain, however it might have been formerly, that the spiritual court is the only court that hath jurisdiction of the probate of wills; and, as incident to such jurisdiction, hath power to determine all those matters that are necessary to the authenticating thereof (*c*).

And the reason why the probate of testaments hath been given unto spiritual men, is, because it is to be intended that they have more knowledge what is for the profit and benefit of the soul of the testator than laymen have; and that they will look more than laymen that the debts of the deceased be paid and satisfied out of his goods, and that they will see his will performed, so far as his goods will extend (*d*).

Bishop.

And, generally, the person before whom the testament is to be proved is the bishop of the diocese where the testator dwelled, or his officer (*e*).

(*a*) 5 Co. 73; 2 Bac. Abr. 402.

(*b*) Wentworth's Off. of Executor, 43. [See also Swinb. pt. 6, s. 11, pl. 3.]

(*c*) 2 Bac. Abr. 398.

(*d*) Perk. 213. The reader will find the jurisdiction of the ecclesiastical courts in wills traced with great learning in Ch. B. Gilbert's argument in the case of *Marriot v. Marriot*, Gilb. Eq. Rep. 203; and Stra. 666. This power appears to have been assumed by them by degrees, after the charter of Will. I. separated the ecclesiastical from the hundred or county court. See tit. *Courts*. In the Roman law, we find that Justinian, Cod. 1, 3, 28, enables bishops or their superiors

to sue for legacies left to pious uses, such as to support the poor, redeem captives, &c. But he prohibits them from proving or registering wills, which it appears they had attempted, confining that power to the secular magistrate. Cod. 1, 3, 41; and 6, 23, 23. It is remarkable that before the introduction of Christianity the pontifical college at Rome could compel an heir to perform the will of the deceased in certain cases where no action was given by the civil law, as where a monument was to be erected. Dig. 5, 3, 50. [See also the preface by Dr. Phillimore to Sir George Lee's Reports.—ED.]

(*e*) Swin. 427.

Archdeacons, as such, have no power to grant probate or commit administration, although most archdeacons in England do it; but they do it not as archdeacons, but by a prescriptive right (*f*). Archdeacons

But there are also certain peculiar ecclesiastical jurisdictions where by prescription or composition, or other special title, the probate or approbation of the testaments of such as dwell and die within those places doth appertain to the judge of that peculiar (*h*). Peculiar (*g*).

Concerning which it is ordered by Canon 126 as followeth: “Whereas deans, archdeacons, prebendaries, parsons, vicars, and others exercising ecclesiastical jurisdiction, claim liberty to prove last wills and testaments of persons deceased within their several jurisdictions, having no known or certain registers, nor public place to keep their records in; by reason whereof many wills, rights, and legacies, upon the death or change of such persons and their private notaries, miscarry and cannot be found, to the great prejudice of his majesty’s subjects; we therefore order and enjoin, that all such possessors and exercisers of peculiar jurisdiction shall, once in every year, exhibit into the public registry of the bishop of the diocese, or of the dean and chapter under whose jurisdiction the said peculiars are, every original testament of every person in that time deceased, and by them proved in their several peculiar jurisdictions, or a true copy of every such testament, examined, subscribed, and sealed, by the peculiar judge and his notary. Otherwise, if any of them fail so to do, the bishop of the diocese or dean and chapter, unto whom the said jurisdictions do respectively belong, shall suspend the said parties and every of them from the exercise of all such peculiar jurisdiction until they have performed this our constitution.”

All testaments are proved and administrations granted in the prerogative court of the several archbishops respectively, where the party dying within the province of such archbishop hath *bona notabilia* in some other diocese than where he dieth (*k*). 2. Where Probate must be taken out. *Bona notabilia* (*i*).

And this power is reserved in the statute of frauds and perjuries; by which it is provided, that “nothing in the said statute shall extend to alter or change the jurisdiction or right of probate of wills concerning personal estates, but that the prerogative court of the Archbishop of Canterbury and other ecclesiastical courts, and other courts having right to the probate of such wills, shall retain the same right and power as they had before in every respect, subject nevertheless to the rules and directions of the said act (*l*).

(*f*) Gibs. 478.

(*g*) [See title *Peculiar*, vol. iii.]

(*h*) Swin. 427.

(*i*) [Godolph. p. 1, c. 22; Swinb.

pt. 6, s. 11.]

(*k*) 4 Inst. 335.

(*l*) 29 Car. 2, c. 3, s. 24.

Bona notabilia.

And by the statute of the 23 Hen. 8, c. 9, ss. 5, 7, (which directeth that persons shall not be cited out of their proper diocese,) it is enacted, that “the same shall not extend to the prerogative of the Archbishop of Canterbury for calling any person out of the diocese where he shall be inhabiting, for probate of any testament; nor shall be in any wise prejudicial to the Archbishop of York, concerning probate of testaments within his province and jurisdiction, by reason of any prerogative.”

The law concerning this matter is, that five pounds is the sum or value of notable goods. But where by composition or custom in any county, *bona notabilia* are rated at a greater sum, the same is to continue unaltered; as in the diocese of London it is ten pounds by composition (*m*).

[There had been some doubt with respect to the value to which goods must amount in order to be considered *bona notabilia*, but this had been settled since the 93d canon, which see below.—ED.]

If he who dieth had goods in both dioceses to the amount of 5*l.* in the whole, the same shall be *bona notabilia*, and consequently under the archbishop's jurisdiction (*n*).

Rolle says: “If a man dieth in one diocese, not having any goods there, but had *bona notabilia* in another diocese, this shall be sufficient *bona notabilia* for the archbishop to grant administration: because the ordinary where he dieth, by the law is to take as great care of the testator and of his goods, as the other ordinary where the goods are.” And he saith Mr. Selden told him, that he had been informed by those of the Court Christian, that this is the usual course there (*o*).

But if a man die upon a journey, the goods that he then hath about or with him, shall not be as *bona notabilia*, to cause administration to be committed or the will to be proved in the prerogative (*p*).

Wages due in King's Dockyards.

By the statute of the 4 Anne, c. 16, s. 26, “Whereas great trouble and expense is frequently occasioned to the widows and orphans of persons dying intestate to monies or wages due for work done in her majesty's yards or docks by disputes happening about the authority of granting probate of the wills and letters of administration of the goods and chattels of such person; for the preventing thereof, it is enacted, that the power of granting probates of the wills and letters of administration of the goods and chattels of such persons is hereby declared to be in the ordinary of the diocese, or such other persons to whom the ordinary power of probate of wills or granting letters of administration do belong, where such persons shall respectively die; and that the wages or pay due from the queen to such

(*m*) 4 Inst. 335.

(*o*) 1 Rolle's Abr. 909.

(*n*) 1 Rolle's Abr. 908, 909; [Ex. 1, pl. 7.]

(*p*) Swin. a. 438, 439; [*Doe v. Owens*, 2 B. & Ad. 423.]

persons for work done in any of the yards or docks, shall not be taken or deemed to be *bona notabilia* whereby to found the jurisdiction of the Prerogative Court.”

Bona notabilia.

Debts owing to the testator are *bona notabilia*, as well as goods in possession (*q*).

Debts where *bona notabilia*.

And they shall be *bona notabilia* in that diocese where the bonds or other specialties be, and not where the debtor inhabits (*r*).

But if the debts be only by simple contract, without specialty, then they are to be esteemed *bona notabilia* in that place where the debtor is (*s*).

Judgments obtained in the courts at Westminster, upon actions laid in the country, are *bona notabilia*, not where the action was laid, but where the judgment was obtained, because the record is there (*t*).

Judgments and Mortgages.

[So are mortgages for years (*u*). An annuity for years out of a parsonage is *bona notabilia* where the parsonage is (*x*).—ED.]

E., 12 Will. 3, *Hilliard v. Cox* (*y*). In debt by an administrator on an administration committed by the Bishop of London, the defendant pleaded in bar, that the intestate at the time of his death was resident in another diocese. And it was held good upon demurrer. And by the court: “The simple contract debts are personal, and administration must be committed of them where the party dies. And if a man hath two houses in several dioceses, and lives most at one, but sometimes goes to the other, and being there for a day or two, dies; administration of his personal estate shall be granted by the bishop of this diocese, for he was commorant there, and not there as a traveller.”

Simple contract Debts.

A bill of exchange shall be said to be *bona notabilia* where the debtor is, and not where the bill is, for it is no specialty in law; for if an executor pays debts upon simple contract, or suffers judgment to pass against him, in such actions he may plead such payment or judgment in bar to an action upon a bill of exchange (*z*).

Bills of Exchange.

In case lands be given to executors for payment of debts or legacies, it seemeth that this shall not be *bona notabilia*, although it be assets (*a*). [Vide infra, “Payment of Debts.”]

Lands for Payment of Debts are not.

[In *Coates v. Brown* (*b*), Sir J. Nicholl said, “The deceased in his lifetime bargained and sold an estate at Ivington, over which consequently he had, or at least assumed, a disposing power, to one Cooper, resident without the jurisdiction of his

What are *Bona notabilia*.

(*q*) 1 Rolle’s Abr. 909.

pl. 2.]

(*r*) Ibid. [Went. Off. Ex. 107, 14th edit.; Com. Dig. tit. Administration (B. 4.)]

(*x*) [Dyer, 305 a, in margin.]

(*y*) 1 Salk. 37.

(*z*) *Yeoman v. Bradshaw*, 3 Salk.

(*s*) Went. Off. Ex. 110, 14th edit.

164.

(*t*) Carth. 148.

(*a*) [Went. Off. Ex. 14th edit.]

(*u*) [1 Oughton, tit. 6, s. 1, n. (*a*),

(*b*) [1 Addams, R. 348.]

What are
bona notabilia.

diocesan, the Lord Bishop of Hereford; and that there actually subsists on the part of his estate a claim against Cooper for a sum not exceeding 5*l.* in respect of and due as upon that purchase; and this in my judgment is fully sufficient evidence of *bona notabilia* to warrant the court's compelling this party to give up the will pursuant to its monition." But the court has refused to enforce a monition to transmit an original will proved in an inferior jurisdiction, where there was only a *naked trust* out of that jurisdiction, and has granted instead a limited administration. It seems doubtful whether in all cases *naked trusts* will create *bona notabilia* (c). It has been held if a bond be but for 5*l.*, to secure the payment of a less sum, although the bond be forfeited, this does not constitute *bona notabilia* (d). Stock in the public funds is supposed to be within the province of Canterbury (e); and it should seem that such property is *bona notabilia* in the diocese of London (f). A lease for years of the value of 5*l.* will constitute *bona notabilia* (g). If a canal runs through both provinces, it seems that probate extracted from the court of the province in which is the office for transacting business will be sufficient (h). And it may happen that a mere diocesan probate is valid for a will disposing of shares in a canal, although the canal flow through more than one diocese (i).—ED.]

Where a Prerogative Probate is necessary.

Where one dies possessed of goods in London and Dublin, in that case the resolution seems to have been, that the Archbishop of Canterbury by his prerogative was to grant administration of the goods in London, and the Archbishop of Dublin for those in Dublin (k).

In case one have *bona notabilia* both in the province of Canterbury and in the province of York, the will must be proved either before both metropolitans, if within each of their jurisdiction there be *bona notabilia* in divers dioceses; or else, if there be not so in any of the places, then before the particular bishops in those several dioceses where the goods are (l).

[But the inference from the case of *Scarth v. Bishop of London* seems to be, that if the deceased dies out of the province, leaving *bona notabilia* in one diocese only, the archbishop and bishop have concurrent jurisdiction (m).—ED.]

Or, if within the one jurisdiction metropolitan the testator had goods in divers dioceses, and in the other but in one diocese; then in the one place is the will to be proved before the

(c) [*Crosley v. Archdeacon of Sudbury*, 3 Hagg. 201.]

(d) [*Went. Off. Ex.* 107.]

(e) [*Rex v. Capper*, 5 Price, 262, (Richards, C. B.)]

(f) [*Scarth v. Bishop of London*, 1 Hagg. 625.]

(g) [*Godolph. pt. 1, c. 22, s. 4.*]

(h) [*Smith v. Stafford*, 2 Wils. Ch. Rep. 166.]

(i) [*Rex v. Worcester Canal*, 1 Man. & R. 529.]

(k) Gibs. 472; [*Burston v. Ridley*, 1 Salk. 329.]

(l) *Went.* 110, 14th edit.

(m) [1 Hagg. 625.]

archbishop, and in the other place before the particular bishop, as it seemeth (*n*).

Where one dies possessed of goods in the diocese of an archbishop, and in a peculiar of the same diocese; there shall be several administrations, and the archbishop shall have no prerogative, because the peculiar was first derived out of his jurisdiction (*o*).

But where one dies possessed of goods in several peculiars within the same diocese; in that case administration shall not be granted by the bishop of the diocese, but by the metropolitan, inasmuch as they are exempt from ordinary jurisdiction (*p*); [or if he dies with goods in a peculiar, and in the diocese (*q*). —ED.]

By Canon 92, "Forasmuch as many heretofore have been by apparitors both of inferior courts and of the courts of the archbishops prerogative much distracted, and diversely called and summoned for probate of wills, or to take administrations of the goods of persons dying intestate, and are thereby vexed and grieved with many causeless and unnecessary troubles, molestations, and expenses; we constitute and appoint, that all chancellors, commissaries, or officials, or any other exercising ecclesiastical jurisdiction whatsoever, shall at the first charge with an oath all persons called, or voluntarily appearing before them, for the probate of any will, or the administration of any goods, whether they know, or (moved by any special inducement) do firmly believe, that the party deceased (whose testament or goods depend now in question) had at the time of his or her death, any goods or good debts, in any other diocese or dioceses or peculiar jurisdiction within that province, than in that wherein the said party died, amounting to the value of 5*l*. And if the said person cited or voluntarily appearing before him, shall upon his oath affirm, that he knoweth, or (as aforesaid) firmly believeth, that the said party deceased had goods or good debts in any other diocese or dioceses or peculiar jurisdiction within the said province to the value aforesaid, and particularly specify and declare the same; then shall he presently dismiss him, not presuming to intermeddle with the probate of the said will, or to grant administration of the goods of the party so dying intestate. Neither shall he require or exact any other charges of the said parties, more than such only as are due for the citation and other process had, and used against the said parties, upon their further contumacy; but shall openly and plainly declare and profess that the said cause belongeth to the prerogative of the archbishop of that province; willing and admonishing the party to prove the said will, or require administration of the said goods, in the court of the said

(*n*) Went. 47.

(*o*) Gibs. 472; Cro. Eliz. 719.

(*p*) Gibs. 472; Swin. a. 440.

(*q*) [See *Parham v. Templar*, 3 Phill. 247.]

Canon 92.

prerogative, and to exhibit before him the said judge the probate or administration under the seal of the prerogative, within forty days next following. And if any chancellor, commissary, official, or other exercising ecclesiastical jurisdiction whatsoever, or any their register shall offend herein, let him be *ipso facto* suspended from the execution of his office, not to be absolved or released until he have restored to the party all expenses by him laid out contrary to the tenor of the premises; and every such probate of any testament, or administration of goods so granted, shall be held void and frustrate to all effects of the law whatsoever. Furthermore, we charge and enjoin that the register of every inferior judge do, without all difficulty or delay, certify and inform the apparitor of the Prerogative Court, repairing unto him once a month and no oftener, what executors or administrators have been by his said judge for the incompetency of his own jurisdiction dismissed to the said Prerogative Court within the month next before; under pain of a month's suspension from the exercise of his office for every default therein. Provided that this canon or any thing therein contained be not prejudicial to any composition between the archbishop and any bishop or other ordinary, nor to any inferior judge that shall grant any probate of testament or administration of goods to any party that shall voluntarily desire it, both out of the said inferior court, and also out of the prerogative. Provided likewise, that if any man die *in itinere*, the goods that he hath about him at that present shall not cause his testament or administration to be liable unto the Prerogative Court."

Shall be held void and frustrate.—In the case of *Smith v. Bingham* (r), it was declared, that administration committed by the archbishop by his prerogative, to one who did not die possessed of goods in divers dioceses, was merely void; which declaration was repeated in the case of *Turner v. Vansdal*. But the more current doctrine is, that such administrations are not void, like those granted by a bishop, where are *bona notabilia*, but only voidable by sentence; because the metropolitan hath jurisdiction over all the dioceses in his province, whereas a bishop can by no means have jurisdiction in another diocese.

[The leading case upon this subject, and indeed upon the whole construction of the 92d canon, is *Scarth v. Bishop of London* (s). In that case Sir J. Nicholl held, that the will of a party who died in *Scotland*, and all whose property, within the province of Canterbury, was in the diocese of London (some of it being in the funds), having been proved in the Consistory of London, a prerogative probate was unnecessary, as the Archbishop and Bishop of London have by practice a concurrent jurisdiction in such cases. The Prerogative Court will however,

(r) Gibs. 472.

(s) [1 Hagg. 625.]

in aid of justice, grant an additional probate if required, limited to the property in the funds. Sir J. Nicholl observed, that the cases cited by counsel as to the practice of the Court of Chancery, only proved that it required a competent probate, and will not direct money to be paid out on a diocesan probate where the money itself in court shows that there are *bona notabilia* in divers dioceses (t).

Canon 92,
Construc-
tion of.

[It seems very doubtful if an original executor takes prerogative probate, and his executor takes diocesan probate, whether the last executor represents the original testator (u).—ED.]

In the case of *Sir Richard Rains v. the Commissary of Canterbury*, H., 1 Anne (x), it was said, that if administration be committed in a diocese where there are *bona notabilia*, though such grant be *ipso facto* void, yet they do not grant a new administration in the Prerogative Court, before they repeal that; and in that case they shall not be prohibited.

[*That if any Man die in Itinere.*].—A person who resided and had property in Gloucester, went on temporary business to Bristol, and an accident causing his death, he died in the latter diocese. It was held that probate from the Court of Gloucester was valid (y).—ED.]

And by Canon 93. "Furthermore, we do decree and ordain, that no judge of the archbishop's prerogative shall henceforward cite or cause to be cited *ex officio* any person whatsoever to any of the aforesaid intents, unless he have knowledge that the party deceased was at the time of his death possessed of goods and chattels in some other diocese or dioceses, or peculiar jurisdiction within that province, than in that wherein he died, amounting to the value of 5*l.* at the least: decreeing and declaring, that whoso hath not goods in divers dioceses to the said sum or value, shall not be accounted to have *bona notabilia*. Always provided, that this clause here, and in the former constitution mentioned, shall not prejudice those dioceses where by composition or custom *bona notabilia* are rated at a greater sum. And if any judge of the Prerogative Court, or any his surrogate, or his register or apparitor, shall cite or cause any person to be cited into his court, contrary to the tenor of the premises, he shall restore to the party so cited all his costs and charges, and the acts and proceedings in that behalf shall be held void and frustrate. Which expenses, if the said judge or register or apparitor shall refuse accordingly to pay, he shall be suspended from the exercise of his office, until he yield to the performance thereof."

Canon 93,
Construc-
tion of.

(t) [*Challnor v. Murhall*, 6 Ves. Sim. 92.]

118; *Newman v. Hodgson*, 7 Ves. (x) 7 Mod. 146.

409; *Thomas v. Davies*, 12 Ves. 417.]

(u) [*In goods of Powell*, 3 Hagg.

196, and n.; cf. *Fowler v. Richards*,

5 Russ. 39, with *Twyford v. Trail*, 7

(y) [*Doe v. Owens*, 2 B. & Ad.

423; and see Sir J. Nicholl's remarks

on this canon, *Scarth v. Bishop of*

London, 1 Hagg. 637.]

Are rated at a greater sum.—One of the sums mentioned by Lindwood, under which nothing should be reputed *bona notabilia*, is 23*l.* 3*s.* 0*d.* And Plowden fixes the sum at 10*l.*, of which Swinburne saith, that it seemed to him to be the opinion most commonly received (*z*).

[As a general rule, it is the safest course to take out, wherever there is the least doubt, a prerogative probate; for this reason, a metropolitan probate on letters of administration is only *voidable*, not void if the deceased had no *bona notabilia* in divers dioceses, whereas in a similar case a diocesan probate is *void* (*a*).

[But an executor cited to prove a will in the Prerogative Court may decline the jurisdiction, and the *onus* lies on the party citing him to establish it (*b*).

[Nevertheless, where an executor applies for probate to the Prerogative Court, an inferior court cannot put him to proof of *bona notabilia*; nor, as it seems, can the holder of a will admonished by the superior court to bring it in (*c*).

[It should be observed too, that the rule of *bona notabilia* is not applicable to the *several* commissaries of *one* ordinary. The power of granting probates, &c. is not *local*, but may be exercised by the ordinary for his own diocese, while he is commorant or resident in that of another (*d*).—ED.]

Probate of
Bishop's
Goods.

The probate of every bishop's testament, or granting of administration of his goods, although he hath not goods but within his own jurisdiction, doth belong to the archbishop (*e*).

Wills in the
British Colo-
nies.

If there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so wherever they go, they carry their laws with them; and therefore such new found country is to be governed by the laws of England; though, after such country is inhabited by the English, acts of parliament made in England, without naming the foreign plantations, will not bind them; for which reason it has been determined, that the statute of frauds and perjuries, which requires three witnesses to a will, and that these should subscribe in the testator's presence, doth not bind in Barbadoes. But where the king of England conquers a country, it is a different consideration; for there the conqueror, by sparing the lives of the people conquered, gains a right and property in such people; in consequence of which he may impose upon them what laws he pleases (*f*).

By the statute of the 25 Geo. 2, c. 6, for avoiding doubts concerning who shall be deemed legal witnesses to wills (which

(*z*) Gibs. 472.

(*a*) [1 Ought. tit. 6, s. 1, n. (*a*), pl. 5, 6; Went. Off. Ex. 110, 14th ed.; Godolph. pt. 6, s. 4, pl. 5; *Lyttons v. Barrow*, 2 Bing. N. C. 486.]

(*b*) [1 Ought. tit. 223.]

(*c*) [*Brown v. Coates*, 1 Add. 345,

n. (*a*).]

(*d*) [*Barnes v. Mordaunt*, Noy, 112; *Carter v. Crofts*, Godb. 33; Cro. Car. 213; 6 Mod. 145.]

(*e*) 4 Inst. 335.

(*f*) 2 P. Wms. 75.

is inserted before under the head *concerning the qualifications of the witnesses*), “Whereas in some of the British colonies or plantations in America, the act of the 29 Car. 2 has been received for law, or acts of assembly have been made whereby the attestation and subscription of witnesses to devises of lands, tenements and hereditaments have been required; therefore, to prevent doubts which may arise in relation to such attestation, it is enacted, ‘That this act shall extend to such of the said colonies and plantations, where the said act of the 29 Car. 2 is by act of assembly made or by usage received as law, or where by act of assembly or usage the attestation and subscription of a witness or witnesses are made necessary to such devise; and shall have the same force and effect in the construction of, or the avoiding of doubts upon, the said acts of assembly, and laws of the said colonies and plantations, as the same ought to have in the construction of, or for the avoiding of doubts upon the said act of the 29 Car. 2 in England: provided, that no devise or legacy shall be made void by this act, unless the will, whereby such devise or legacy shall be given, shall be made after March 1st, 1753.”

Wills in the British Colonies.

An estate in the plantations is testamentary, and assets to pay debts; for if the executor hath goods of the testator in any part of the world, he shall be charged in respect thereof (*g*).

[If a will be made here and proved in the Prerogative Court, the probate will not extend to property in the colonies, though if the testator were domiciled in this country the Court of Probate in the colony ought to grant it to the same person (*h*); and an administrator or executor duly appointed within the queen’s dominions out of England has a right to hold the property of which the deceased died possessed there, against the executor or administrator under a grant obtained in this country (*i*). *Vide supra*, “*Domicil*.”

[But a will made abroad of personal property in this country must be proved here also as well as in the country of his domicil, that is to say, a duly authenticated copy must be transmitted here, of which probate is taken, and which is deposited in the registry as if it were an original will (*k*).—ED.]

An appeal from decrees made in the plantations lies only to the king in council (*l*).

Wills only concerning goods and chattels are under the cognizance and direction of the ecclesiastical laws (*m*).

And the probate of testaments concerning lands only, and no

Wills of Lands not subject to ecclesiastical Jurisdiction.

(*g*) 6 Co. 46; 2 Ventr. 358; 4 R. 429.]
Mod. 226.

(*h*) [*Burn v. Cole*, Ambl. (Lord Mansfield), 466; *Atkins v. Smith*, 2 Atk. 63.]

(*i*) [*Currie v. Bircham*, 1 Dowl. & Ryl. 35; *Jauncey v. Sealey*, 1 Vern. 397; *Farrington v. Clarke*, 2 Chitt.

(*k*) [*Tourton v. Flower*, 3 P. Wms. 369; *Toller*, 70; *Raymond v. De Watteville*, 2 Lee, 368. The same rule is applicable to Scotland, Ireland and the Colonies.]

(*l*) 2 P. Wms. 261.

(*m*) *Gibs*. 463.

goods contained therein, ought not to be in the spiritual court; and if there be a suit to compel to have the probate of such testaments, a prohibition lieth (*n*).

But where a will is concerning lands and goods, and so is a mixed will, the probate thereof shall be entire in the spiritual court, and ought not to be of parcels; but the probate of the will for the land will not prejudice the heir, for it shall not be evidence at the common law; nor the witnesses being there examined, shall such examinations be given in evidence at the common law (*o*).

And where a will doth contain in it lands and goods, generally, the courts temporal will not grant a prohibition to stay the probate thereof for the whole; but if in a special case, it be alleged, that the testator was of nonsane memory, or the like, a prohibition will be granted for the whole. For if the spiritual court should be suffered to proceed, and prove the will there, and allow it there for the personal estate, it would be an evidence to induce the jury, upon a trial at law, to pass for the will as to the lands and tenements (*p*).

[In such cases of mixed wills, the proper officer of the ecclesiastical court attends on trials at *nisi prius*, with the original will; and according to present practice it is delivered by the same officer to the agent of the party petitioning to establish in the Court of Chancery, upon such agent's giving security for its safe return (*q*).—ED.]

Will of Goods
not effectual
before Pro-
bate.

But a devise of a personal estate is not looked upon to be of any effect until probate is made of the will by the executor, neither can an executor or other person give a will in evidence concerning a personal chattel without producing the probate, for this will is no will until it has received a sanction or an allowance of it in the spiritual court, for they are to judge whether it be a will or not, and the temporal courts are not to look upon it as a will till probate be made; and in an action of trover for goods which a testator gave to his sister in his lifetime, brought against his executor for them, who would have given in evidence a former will, to have shown that he had no power to give those goods, this was refused, because he ought to have produced the probate (*r*).

And a probate obtained in the ecclesiastical court cannot be set aside in any other court either of law or equity (*s*). In the case of *Barnesly v. Powel*, August 5th, 1748 (*t*), a probate of a forged will was obtained in the ecclesiastical court by a fraud upon the plaintiff in procuring his consent to such probate, and

(*n*) *Netter v. Brett*, Cro. Car. 396; vol. i. p. 285.]
[*Anon.* 3 Salk. 22.]

(*o*) *Netter v. Brett*, Cro. Car. 396.

(*p*) E., 12 Jac., *Egerton v. Egerton*, Cro. Jac. 346.

(*q*) [See V. Wms. on Ex. and Ad.

(*r*) *Chaunter v. Chaunter*, 1708, Vin. "Executors," A. a. 20; [*Hensloe's case*, 9 Co. 8.]

(*s*) *Vide infra*.

(*t*) 1 Ves. 119, 284.

by the like means a decree in the Court of Exchequer was obtained to establish the said will as to the real estate. Upon these facts being disclosed, and a bill filed in Chancery, an issue was directed to try the validity of the will at law, which the jury found to be forged. And the question was, What could now be done, especially with respect to the personal estate, and the decree in the Exchequer likewise standing in the way with respect to the real estate? Lord Hardwicke said,—As to the decree in the Exchequer, the same having been obtained by fraud, though he could not set it aside, yet he could decree that no use should be made of it. As to the personalty, undoubtedly the jurisdiction of wills of personal estate belongs to the ecclesiastical court, according to the rules of which court it must be tried, notwithstanding that the will is found forged by a jury at common law by examination of witnesses, which is sometimes unfortunate, causing different determinations, nor can this court help it. But in the present case his lordship decreed, that the defendant should consent in the ecclesiastical court to a revocation of the probate; and though he would not then decree the defendant a trustee of the personal estate, lest it might create some jealousy of infringing on the ecclesiastical court, yet he decreed an account of the personal estate to be taken, and the same to be paid into the Bank for the benefit of the parties entitled.

He that is named executor cannot be precisely compelled to stand to the will and undertake the executorship, unless he have already meddled with the goods of the testator as executor, for then he is not only to be compelled to perform the office of an executor, but also if he should refuse, and the ordinary commit the administration unto him, this refusal is void, and he shall be charged as executor (*u*). 3. Refusal of an Executorship.

Therefore, if the executor named in the testament resolve not to stand to the executorship, but to refuse the same, then must he beware that he do not administer the goods of the deceased as executor, for having once administered as executor he may at any time after be compelled to undergo the burden of an executor, and also may be sued as executor by the creditors of the testator, though he cannot sue others as executor, for he hath not the will under the ordinary's seal (*x*).

And a person is then said to administer as executor, so as thereby he may be compelled to stand to the executorship when he doth perform those acts which are proper to an executor; as to pay the debts due by the testator, or to receive any debts due unto the testator, or to give acquittances for the same, with other such like acts (*y*).

But if a man do those acts which are not proper to an executor, he is not said to have administered as executor to the

(*u*) Swin. 384.

(*x*) Swin. 469.

(*y*) Ibid.

effect as aforesaid, as to feed the cattle of the deceased lest they should perish, or to take into his custody the goods of the deceased to the end they may be safe from being stolen or purloined, or to dispose of the testator's goods about the funeral; for these be deeds of charity common to every Christian, and not peculiar to an executor. Likewise, to make an inventory of the goods of the deceased, is not to administer as executor; or to deliver to the wife her convenient apparel; or to take the testator's horse and ride him, or to use him as his own, supposing him not to be the testator's but his own; or to take the goods of the testator by his lawful gift. And, generally, whosoever as a mere trespasser entereth on the goods of the testator, whether it be to things living, as horse, kine, sheep; or dead things, as pots, pans, dishes, converting the same to his proper use, and not to the use of the testator, as to the payment of the testator's debts or legacies, doth not administer as executor (z).

Howbeit, in these cases and such like, whosoever feareth to be adjudged executor administering of his own wrong, the most safe course is, not to meddle at all, but utterly to abstain from all manner of use of the testator's goods; and namely, let him beware that he do not sell any goods or kill any cattle of the deceased (a).

Further, although a person hath not meddled with the goods of the testator, and is therefore not compellable; yet, if a legacy be left to him, he may be compelled to stand to the executorship, or else to lose his legacy (b).

The refusal to take upon him the executorship cannot be by word only, but it must be entered and recorded in court (c).

And when an executor hath once administered, he cannot afterwards refuse to prove the will, and take upon him the executorship; and in that case the ordinary ought not to accept such a refusal, but to compel him to prove the will, and take upon him the executorship. Yet if the judge doth admit one to administer, notwithstanding his having been formerly refused, it shall stand good (d).

[An executor must refuse *entirely* or not at all (e).

[It seems to be now settled law, in spite of some old cases which would lead to a contrary conclusion, that it is in the power of the ordinary, if he pleases so to exert it, to accept the executor's refusal, notwithstanding he has administered to the effects (f).

(z) Swin. 471, 472.

(a) Swin. 472.

(b) Gibs. 469.

(c) Swin. a. 443.

(d) [Swin. pt. 6, s. 2, pl. 6, s. 22; Godolph. pt. 2, c. 19; *Pytt v. Fendall*, 1 Lee, 553; *Long v. Symes*, 3 Hagg. 774; *Wickenden v. Thomas*,

2 Brownl. 58.]

(e) [*Paule v. Moodie*, 2 Roll. Rep. 132; 11 Vin. Abr. 139, pl. 10.]

(f) [1 Roll. Abr. Exor. (C) 2, p. 207; Went. Off. Ex. 91, 14th ed.; *Doyle v. Blake*, 2 Scho. & Lefr. 237; *Jackson v. Whitehead*, 3 Phill. 577.]

[And it seems that if the executor has administered, and the ordinary, in ignorance of the fact, has granted administration to another, that although it is competent to him to revoke the grant, and compel the executor to prove the will; yet, that until he does so, the former administration is valid. Nevertheless, the executor, having intermeddled, is liable to be sued both at law and equity (g).

[In the case of *Jackson and Wallington v. Whitehead* (h), the question as to whether an executor who had taken the oath of office could be dismissed, Sir John Nicholl said: "The executors were sworn, and the probate was afterwards stopped by a caveat; after that, an appearance was given for the executors, and after that an application was made to dismiss one of the executors, in order that he might be examined. He is stated to be a material witness in the cause, as he received instructions from the deceased for the making of the will, and was present at the execution of it. It is not to be denied that in a great variety of cases executors have been dismissed after proceedings have been had; but it is said that he has appeared in the cause as a party, and also been sworn as an executor; and these circumstances are considered as precluding him. I have looked through a great variety of cases, and have not found any one in which the circumstance of a person having been sworn as an executor has ever been that on which the court has refused to allow him to renounce, nor has it ever been made a material ground. The only authority in any point is that in *Ventris* (i). We well know that a single case connected with proceedings in this court, reported so incorrectly as it seems to be, cannot be safely relied upon; and at most it only decides that a voluntary renunciation is not so binding as to exclude an executor from the duties of the executorship. Another question is, whether, if he be dismissed, his evidence could be received. After looking through a great number of cases, I find none where the court has refused to dismiss, except on the ground of the party having intermeddled with the effects. The reason for this is obvious; that where

An Executor
may renounce
after he has
sworn.

(g) [See cases cited in last note, and *Rogers v. Frank*, 1 Y. & J. 409; *Read v. Truelove*, Amb. 417.]

(h) [3 Phill. 577; *Panchard v. Weger*, 1 Phill. 212; *In re Wilkinson*, 3 Phill. 96; see also *Thompson v. Dixon*, 3 Add. 272, and *Meek v. Curtis*, 1 Hagg. 129.]

(i) [A mandamus was prayed to the Ecclesiastical Court to grant the probate of a will under seal, &c. The case was,—the executor named in the will had taken the usual oath, and then refused, (but after a caveat entered,) and another endeavoured to

obtain, letters of administration. The executor afterwards came to desire the will under probate, and contested the granting of administration, which was adjudged against him, supposing that he was bound by his refusal. And after an appeal to the Delegates this mandamus was prayed, and granted by the court; for having taken the oath, he could not be admitted to refuse, and the Ecclesiastical Court had no further authority, and the caveat did not alter the case. Note—The oath was taken before a surrogate, yet it was all one. 1 Vent. 335.]

An Executor
may renounce
after he has
sworn.

a party has intermeddled, he has taken upon himself the burthen, and acquired the responsibility of an executor; that was the principle of the decision in *Haywood v. Bridges* (i)."

[An executor who has renounced may, at any time before administration has passed the seal, retract (k). One of several executors who has renounced may, after the death of his co-executors who have proved the will, retract his renunciation, and take probate as a matter of course; but the same right does not accrue to the executor who has renounced *after administration with the will annexed has been granted*, on account of the possible inconvenience that might accrue, if the *chain of executorship*, once broken, were then suffered to be revived; nor can any administration with the will annexed be *then* granted to such an executor, a residuary legatee, if any, being preferably entitled, or, if there be no residuary legatee, the next of kin (l).

4. What
Acts
amount to
an Admin-
istration:
First.

[In Bacon's Abridgment (m), under the head "What acts amount to an administration, so that a party cannot afterwards refuse," it is laid down, "1st. Whatever an executor does which shows an intention in him to take upon him the executorship, will regularly amount to an administration."

[In *Long v. Symes* (n), there was an insertion of an advertisement calling on persons to send in their accounts, and to pay money to the testator's estate to Y. and Z., "his executors in trust;" Sir J. Nicholl held this act rendered them compellable to take probate. So to take possession of testator's goods, or to dispose of them to others (o), or even the goods of a stranger, under the conviction that they belonged to testator (p) to receive debts, and especially to give receipts or releases for them (q); or, being co-executor, to take possession of a specific legacy without the consent of the other executor (r), are all acts which amount to an administration, rendering the performance of the functions of an executor obligatory on the doer of them.

[But if an executor seizes testator's goods, claiming them for *his own*, even if he be afterwards proved to have no right to them (s); or if he *has not* proved himself, and he assist a co-executor who *has* proved, in writing letters, collecting debts, &c. (t), he is not within the application of this rule.

[The refusal must be not verbally, but by some act entered

(i) [Prerog. 1767.]

(k) [Macdonnell v. Prendergast, 3 Hagg. 212.]

(l) [In the goods of William Thornton, 3 Addams, 217.]

(m) [Title Executors, (E) 10.]

(n) [3 Hagg. 771.]

(o) [Wentw. c. 3, p. 93, 14th ed.]

(p) [Bacon's Abr. tit. Executors, (E) 10.]

(q) [Wentw. ib.; Pytt v. Fendall, 1 Lee, 553.]

(r) [Bacon's Abr. ibid.; 1 Roll. Abr. 917, tit. Executors, (B) pl. 9; and Sir J. Nicholl's remarks in Long v. Symes, 3 Hagg. 771.]

(s) [Bac. Abr. ibid.]

(t) [Orr v. Newton, 2 Cox, 274; Stacey v. Elph, 1 M. & K. 195; but see Harrison v. Graham, 1 P. Wms. 241, n. 9, 6th ed.]

and recorded in court; and until it be recorded, no person can take out administration (*u*).

[If a party renounce in person, he takes an oath that he hath not intermeddled with the effects of the deceased, and will not intermeddle, with any view of defrauding creditors; if the renunciation be by proxy, the oath is dispensed with (*x*); but the renunciation must be accompanied, according to a settled rule of practice of the Prerogative Court of Canterbury, with the bringing in of the original will into the Registry (*y*).

[We have seen the first class of acts which, according to Bacon, amount to an administration, and prevent the person who has done them from refusing the executorship. “2. (the same author says) Whatever acts will make a man liable as an executor *de son tort*, will be deemed an election of the executorship (*z*).”—ED.]

Secondly.

An executor of his own wrong is such as takes upon him the office of an executor by intrusion, not being constituted by the testator or deceased, nor (for want of such constitution) substituted by the ordinary to administer (*a*). [And he may be compelled by the ecclesiastical court to take probate (*b*).—ED.]

Executor of his own wrong.

If a man gets goods of an intestate into his hands after administration is actually granted, it doth not make him executor of his own wrong; but if he gets the goods into his hands before, though administration be granted afterwards, yet he remains chargeable as a wrongful executor, unless he delivers the goods over to the administrator before the action brought, and then he may plead *plene administravit* (*c*).

Executor *de son tort*.

An executor of his own wrong cannot bring an action; for he cannot show the testament containing his name, as he ought (*d*).

Neither can he retain for his own debt or legacy (*e*); though he be a creditor of a superior nature (*f*).

But if a wrongful executor afterwards procure administration, he may plead this *puis darrein continuance* to justify a retainer (*g*). If a creditor sell goods after the death of the debtor, under a bill of sale which is set aside as fraudulent because possession did not accompany and follow it, he may be sued as an executor *de son tort* (*h*).

(*u*) [Long v. Symes, 3 Hagg. 776; Wentworth's Off. Ex. 86, 14th ed.; Godolph. pt. 2, c. 19, s. 4; Broker v. Charter, Cro. Eliz. 92; Moor. 272; 1 Leon. 135.]

(*x*) [Toller, 42.]

(*y*) [In the goods of Martha Fenton, 3 Add. 35.]

(*z*) [See remarks of Mr. Justice Buller in Edwards v. Harben, 2 T. R. 597.]

(*a*) Wentw. 171.

(*b*) [See recent case of Rayner v. Green, 2 Curteis, 248.]

(*c*) 1 Salk. 313; per Holt, C. J. S. P. Curtis v. Vernon, 3 T. Rep. 587, affirmed in the Excheq. Chamber; 2 H. Bla. 18; see Coulter's case, 5 Rep. 30; and 2 Bac. Abr. 390.

(*d*) Br. Administrator, 8.

(*e*) Mo. 527; Poph. 125.

(*f*) Curtis v. Vernon, *ubi supra*.

(*g*) Vaughan v. Brown, 2 Stra. 1106.

(*h*) Edwards v. Harben, 2 T. Rep. 587.

Executor *de
son tort.*

But he renders himself liable to the action not only of the right executor, but also to the suits of the testator's creditors; yet only so far as the goods which he so wrongfully administered amount unto (*h*).

Webster v. Webster (*i*). In this case the defendant did not take out probate of the testator's will till sixteen years after his decease; but the court allowed the plea of the statute of limitations, on the ground that he had taken possession of the personal estate, and might have been sued as *executor de son tort* long before he had obtained the probate.

So also, it is said, he shall be sued for legacies, as well as a lawful executor (*h*).

But if he doth lawful acts with the goods, as paying of debts in their degrees, it shall alter the property against the lawful executor; as if he pay just and honest debts, the rightful executor shall not avoid that payment. It is true, the rightful executor may maintain against him an action of trover; but he shall only recover in damage so much as the wrongful executor hath misapplied. By Holt, Chief Justice (*l*).

But Mr. Wentworth is of opinion, that albeit such payment shall stand good as against other creditors, yet it is not good as against the rightful executor or administrator; for then any stranger might usurp the office of executor, and take from him that liberty and election to prefer which creditor he will in first payment; yea, might take from the executor power to pay himself before others, in case there were a debt due to him, which would be unreasonable (*m*).

Mountford v. Gibson (*n*). In this case the Court of King's Bench decided, that a creditor of an intestate, who had received goods of the intestate after his death from his widow, in payment of his debt, cannot protect his possession against an action of trover by the lawful administrator, upon the ground of such delivery having been made by one who had by such intermeddling made herself executrix *de son tort*, no fact appearing to give colour to her having acted in the character of executrix, except the single act of wrong complained of, in which the defendant participated.

And as he himself is liable to the suit of the lawful executor, creditors, or legatees; so also, in case of his death, are his executors or administrators liable by the statute 30 Car. 2, c. 7, although in other cases, a personal wrong dieth with him that did it. And although he hath obtained probate, yet if upon appeal such probate shall be annulled and made void, acts done by him pending the appeal shall not be good. As in a case, *M.*, 5 Anne, in the Common Pleas: an action was brought

(*h*) Swin. 339; Harr. Justin. 87;
Vin. Executors, E. a. 4, 5.

(*i*) 10 Ves. 93.

(*k*) Noy, 13.

(*l*) 12 Mod. 471.

(*m*) Went. 182.

(*n*) 4 East's Rep. 441.

by the plaintiff, as executor, for money due from the defendant to his testator. The defendant pleads, that another person was appointed executor to the testator, and proved his will, and that he, the defendant, had paid him part of the money in satisfaction of the whole, and that the said person on receipt thereof discharged the defendant. The plaintiff replied, that the probate granted to the other person was afterwards, upon appeal, annulled by sentence in the ecclesiastical court, and the will by which he was made executor adjudged to be forged, and the will by which the plaintiff is appointed executor allowed. On demurrer, the question was, whether payment to one who was executor *de facto*, and had probate of the will, was good to bind the rightful executor; and the court gave judgment that it was not. And by Trevor, Chief Justice: An executor derives all his authority from the testator himself; and as executor, without any thing more, he has the power of disposing of the estate of the testator, of releasing a debt due to the testator, and the like. True it is, before an action brought, probate is necessary; but that is only requisite to ascertain the court that the plaintiff is executor and has a right to bring his action, not to give the plaintiff any title or interest to the estate of the testator. If the testator appoints no executor, or dies intestate, the administrator is appointed by the ordinary, and derives his authority from him, and therefore, if administration is granted, all acts by him, as long as the administration continues in force, are good, and even though it be afterwards repealed. But there is a difference taken (o) when an administration is repealed upon a citation, or upon an appeal. If it is upon an appeal, which suspends the administration, all acts after such suspension are void; if it is repealed upon a citation, all the acts of the administrator, till the repeal, are good, for by the citation the grant of the administration is not suspended; therefore, if the administration be repealed, all acts done by an administrator, which a rightful administrator might have done, shall be allowed, for in them he acted in the place of the rightful administrator. But it is otherwise in the case of an executor, for the probate of the will gives no authority at all to him, and therefore if he is not the rightful executor, he has no authority, and it would be unreasonable that a person who has no authority should dispose of the interest of another. The rightful executor has not only a trust or authority to administer the goods of the testator, but also an interest annexed to the trust; and therefore the property of all the goods, after administration, is completely vested in him; and consequently, the disposition by another person of the goods of the testator, or release of his debts, is a disposition of the interest of the rightful executor, and therefore such disposition

Executor *de
son tort.*

(o) 6 Co. 18.

Executor *de son tort*.

doth not bind him. And this case is not like the case of an officer who officiated without legal authority as the deputy of the deputy of a steward, for rightful acts done by him are good; for he is an officer *de facto*, and in the immediate and open execution of his office, and the parties did not know whether he had authority or not. And he said, in this case of an executor some mischief indeed may possibly happen; but it would be a more general inconvenience, if a wrongful executor should be allowed to dispose of the right and interest of a rightful executor (*p*).

[In *Padget v. Priest* (*q*), Mr. Justice Buller said, "It is for the court to say what acts make an executor *de son tort*, but for the jury to decide whether they are sufficiently proved. A very slight act of intermeddling with the testator's goods will constitute a man *executor de son tort*. Living in the house and carrying on the trade of the deceased, even where the wife proved the will after the intermeddling (*r*); acting under a power of attorney given by an executor after his death makes an executor *de son tort* (*s*); all acts, in fact, which can be considered as *indicia* that the person so intermeddling was the representative of the deceased, *e. g.* milking cows (*t*), killing cattle (*u*), selling goods (*x*), taking goods to satisfy his own debt or legacy, &c.—ED.]

Co-executors, some of them do refuse (*y*).

Where there are divers executors named in the will, and some of them do refuse, and others of them prove the testament, they who refuse may after their pleasure administer, notwithstanding such refusal before the ordinary (*z*).

And this is what in the spiritual court is called a double probate, which is in this manner:—The first that comes in takes probate in the usual form, with reservation to the rest; afterwards, if another comes in, he also is to be sworn in the usual manner, and an ingrossment of the original will is to be annexed to such probate in the same manner as the first: and in the second grant, such first grant is to be recited; and so on, if there are more that come in afterwards.

For notwithstanding their refusal at first, they still continue executors; and at any time during the lives of their companions they may prove the will, they may pay debts, make releases, and they must be joined in all suits where the co-executors are plaintiffs, because they are all privy to the will; but not where

(*p*) *Anon.* Comyns, 150.

(*q*) [2 T. R. 97.]

(*r*) [*Edwards v. Harben*, 9 T. R. 97, 587, 597; *Hooper v. Summerset*, Wightw. 16; *Vernon v. Curtis*, in error, 2 H. Bl. 18.]

(*s*) [*Cottle v. Aldrich*, 4 M. & S. 175.]

(*t*) [Dyer, 166 b, marginal note.]

(*u*) [Godolph. pt. 2, c. 8, s. 4.]

(*x*) [*Read's case*, 5 Co. 33 b; *Padget v. Priest*, 2 T. R. 97; V. Wms. on Ex. and Adm. vol. i. p. 186; Godolph. pt. ii. c. 8; Swin. pt. ii. s. 23; Bac. Abr. tit. "Executors," (B, 3); 1 Toller, 40.]

(*y*) *Vide infra*, "Getting in the Effects."

(*z*) 9 Co. 37; Bacon's Use of the Law, 161; Perk. 212.

they are defendants, because the plaintiff in the action is not bound by law to take notice of any but those who have proved the will (a).

For the king's courts have always used to allow the probate of some of the executors to enable them all to sue actions, so that the probate of the testament doth not give to them any interest or title either to things in action or in possession, for they have all their title and interest by the testament, and not by the probate; but yet without the probate, the judges allow them not to sue actions (b).

It is holden, that he which did refuse the executorship, cannot assume that office after the death of his fellow executor (c).

But in the case of *House v. Lord Petre* (d), Dec. 19, 1700, before the Delegates, the common lawyers held, that if one executor refuseth before the ordinary, and the rest prove the will, yet, at common law, he who refused may at any time come in and administer; and though he never acted whilst his companions were living, yet after their death he shall be preferred before any other executor made by a co-executor; although the civilians held, that by their law the renunciation was peremptory.

Rex v. Sir Ed. Simpson (e). A motion was made for a mandamus to the judge of the Prerogative Court of the Archbishop of Canterbury, to admit the retraction of a renunciation of an executorship made by one Brown. There were two executors, and probate had not been granted to either, but Brown had not taken the oath of renunciation, "that he had not and would not intermeddle in the effects, &c. but renounced all right of execution of the will." Against the mandamus, it was said, that by the law and practice of the ecclesiastical courts, no retraction could be admitted of a renunciation upon oath, which would be to admit him who renounced to perjure himself for it; for the mandamus, that upon good cause the court below can absolve from the oath, and the common, not the canon law, must govern this point, by which an executor has a right to demand probate, although he has renounced. But the parties entered into a rule by consent that probate should be granted to both executors (who were also trustees, but insolvent), they giving proper securities and indemnifications to each other, and to the *cestui que trust*.

If a man maketh two executors and dieth, and one of them proveth the will in the name of them both against the will of the other, this is not any administration for him who consented not to the probate; but he may plead *ne unques executor*, for the probate maketh him not executor if he doth not administer (f).

Where one
Executor ex-
cludes the
other.

(a) Swin. (a) 444.

(b) 9 Co. 38.

(c) Swin. 326, 418; Dyer, 160 b.

(d) 1 Salk. 311.

(e) 3 Burr. 1463, and 1 Bla. Rep. 456.

(f) 1 Rolle's Abr. 918.

Where all
refuse, Admi-
nistration to
be committed.

Swinburne says (*g*), when all the executors named in the testament do refuse, it is lawful for the bishop or ordinary to commit administration, and to annex the will to the letters of administration and the administrators shall have action, and may administer the goods of the deceased as if he had died intestate; and their authority or act done is good and effectual in the law in the mean time, until the executors undertake the executorship; for then the ordinary may revoke the administration before by him committed.

So also if a man make an executor, but this is not known or is concealed, the ordinary may grant administration, and this shall be good until the other prove the will (*h*).

And so in like manner if the person be disabled to be executor, or no executor at all be named in the will (*i*).

But Lord Coke says, if they shall refuse before the ordinary, and the ordinary commit administration to another, there they cannot administer afterwards (*j*).

And by Lord Chancellor Talbot, in the case of *Robinson v. Pett*, E., 1734 (*k*): Where there are two executors, and one renounces, he is still at liberty, whenever he pleases, to accept of the executorship; otherwise, if both renounce, and the ordinary commits administration to another.

Within what
Time the Will
shall be
proved.

Regularly (that is, by the civil law), testaments ought to be insinuated to the official or commissary of the bishop of the diocese within four months next after the testator's death (*l*).

5. What
the Execu-
tor may do
before Pro-
bate (*m*).

And the executor, for goods of the testator taken from him, or a trespass done upon the lease land, or a distraining or impounding of goods or cattle, may maintain, before the will be proved, actions of trespass, or replevin, or detinue; for these actions arise upon the executor's own possession (*n*).

But before the proving of the will, an executor cannot maintain a suit or action of debt, or the like: and the reason is, for that therein he must show forth the will proved under the seal of the ordinary (*o*).

*And in general, an executor is a complete executor before probate, to all purposes but bringing of actions; so that he may release an action, assent to a legacy, may be sued, may alien or otherwise intermeddle with the goods of the testator (*p*). [Except indeed in cases where the executor has actually been possessed of the property which is the subject of the action (*q*). —ED.]*

(*g*) Swin. 380, 383; 1 Rolle's Abr. 907. Williams on Ex. & Ad. vol. i. 212.]

(*h*) 1 Rolle's Abr. 907.

(*i*) Swin. 380.

(*j*) 9 Co. 37.

(*k*) 2 P. Wms. 351.

((*l*)) Swin. a. 447.

(*m*) [Godolph. pt. 2, c. 20; Went. Off. Ex. 81, 14th edit.; Vaughan

(*n*) Went. 34.

(*o*) Ibid.

(*p*) [*Thompson v. Reynolds*, 3 Car. & P. 123.]

(*q*) [In V. Wms. Ex. & Ad. vol. i. 215, see this very clearly stated.—ED.]

For by administering, the executor hath accepted of and taken upon him the whole administration before the probate; and is thereby entitled to receive all debts due to the testator; and all payments made to him are good, and shall not be defeated, although he should die and never prove the will (*r*).

What the Executor may do before Probate.

Also the executor may in convenient time after the testator's death, enter into the house descended to the heir, for the removing and taking away of the goods, so as the door be open, or at least the key be in the door: and this seemeth to be understood of the door of each room. For although the door of entrance into the hall and parlour be open, the executor cannot by that justify the breaking open of the door of any chamber, to take the goods there, but only may take those in the rooms which be open. And this seemeth to be proved by the case of the chest with evidences, which, it is said, the executor may take, and put out the deeds, delivering them to the heir, that is to say, the chest being unlocked. Now a chamber or other room within the house locked is an inclosure of better respect than a chest. But if the goods be not removed within convenient time, the heir may distrain them as damage-feasant (*s*).

T., 5 Jac. 1, *Stoddenv. Harvey* (*t*). Trespass: Upon demurrer, the case was: Lessee for life of a house and pasture land dies; his executors suffer his cattle to go there for six days after his death, and then removed them; and in trespass, justify for that time; averring, that in that time of six days they could not procure any other land or place to put in the cattle. Whereupon it was demurred. And whether that were a convenient time to remove them was the question. And the court seemed to incline, that six days is but a convenient time for the removing of their cattle: and the law allows a convenient time for their removing, especially it being averred, that they had not any other place to remove them unto. But for a fault in the plea, wherein he pleaded a lease of the house, but not of the land in the declaration mentioned, it was adjudged for the plaintiff.

In like manner, the executor before probate may be sued for the debts of the testator, unless he refused the executorship in due manner so as administration may be granted, and so there be somebody suable for the testator's debts (*u*).

So a bill for discovery of effects may be brought before probate: as in the case of *Dulwich College v. Johnson*, E., 1688 (*x*). A bill for a discovery of the personal estate was brought before the will was proved, the will being controverted in the spiritual court. And this was pleaded to the bill, but overruled: a discovery being for the benefit of all persons interested, and

(*r*) *Wankford v. Wankford*, 1 Salk. 306, 307, per Lord Holt.

(*s*) Went. 92.

(*t*) Cro. Jac. 204.

(*u*) Went. 36.

(*x*) 2 Vern. 49.

What the Ex-
ecutor may
do before
Probate.

necessary for the preservation thereof. And such discoveries have often been ordered *pendente lite* in the spiritual court.

And in the case of an administrator, a court of equity will allow of a bill brought by an administrator before administration is actually taken out: as in the case of *Fell v. Lutwidge*, Feb. 3, 1740. The widow brought a bill for recovery of the effects of her late husband, and did not take out administration till after the bill brought. It was objected, that the bill was brought too early. By the Lord Chancellor Hardwicke: It is very true that this would have been an exception in an action at law; but it is not so to a bill brought in this court. And the exception was overruled (*y*).

[The executor of the grantee of a next avoidance of a church may grant the advowson before probate (*z*). And such acts as those mentioned above as being allowable to be done before probate, are valid even if the person doing them die without ever proving the will (*a*). But if he die before probate, his executor shall not be executor to the first testator (*b*). And when any acts done before probate by an executor are relied on for a title, a subsequent probate must be produced (*c*).—*ED.*]

6. Ordinary
to cite the
Executor
to prove
the Will.

By the 21 Hen. 8, c. 5, "The ordinary or other person having authority for probate of testaments, may convent before them persons named executors of any testament, to the intent to prove or refuse the testament, as they might do heretofore."

And by the 1 Edw. 6, c. 2, s. 3, "All summons and citations or other process ecclesiastical, in all causes of probates of testaments, and commissions of administrations of persons deceased, shall be made in the name and with the style of the king, as it is in writs original or judicial at the common law; and the teste thereof shall be in the name of the archbishop or bishop, or other having ecclesiastical jurisdiction; and the commissary, official, or substitute exercising jurisdiction under him, shall put his name in the citation or process after the teste."

And the ordinary may sequester the goods of the deceased until the executors have proved the testament; so may the metropolitan, if the goods be in divers dioceses (*d*).

And if the executors do not appear upon the process, the ordinary may excommunicate them (*e*). But they may pray

(*y*) Bern. Cha. Ca. 320.

(*z*) [*Smithley v. Chameley*, Dyer, 135 a.]

(*a*) [*Brazier v. Hudson*, 8 Sim. 67; Dyer, 367 a; *Rex v. Stone*, 6 T. R. 298; *Anon.* Frem. Cha. Ca. 28, pl. 22—6; *Wankford v. Wankford*, 1 Salk. 306, 307; *Croft v. Pyke*, 3 P. Wms. 182.]

(*b*) [*Isted v. Stanley*, Dyer, 372 a; *Hoyton v. Wolfe*, Cro. Jac. 614; *Day*

v. Chatfield, 1 Vern. 200; *Wankford v. Wankford*, 1 Salk. 308; S. C. 1 Freem. 520.]

(*c*) [*Pinney v. Pinney*, 3 B. & C. 335.]

(*d*) Swin. a. 477, 478.

(*e*) [See titles *Excommunication*, vol. ii., and *Practice*, vol. iii., for the writ *De contumace capiendo*, substituted for excommunication.—*ED.*]

time to advise; and the ordinary may grant in the meantime letters *ad colligendum bona defuncti* (f).

On the other hand (inasmuch as the executor, though he may be sued, and pay debts, and release an action, yet cannot *have* an action before probate), the ordinary is *bound* to prove the will; and if the executor accept, and desire probate, and is refused by the ordinary, a writ will go from the temporal courts to compel him to proceed to probate where the will is not controverted; and that notwithstanding an appeal to the Delegates, as it was in the case of *Dunkin v. Munn*, M., 26 Car. 2, in which such writ was granted to the Prerogative Court (g).

Mandamus to compel the Ordinary.

But if the validity of the will is contested, it is a sufficient answer by the ordinary to a writ of mandamus, to return, that a suit is depending before him concerning the same, and not yet determined (h).

[But it is no good return, that the person appointed executor in the will is insolvent, and that he refused to give security to pay legacies, for the ordinary has no authority to demand security where the testator has required none (i).

[Where the return by the judge of the spiritual court to the *mandamus* stated, that by the practice of his court, if any creditor of the deceased entered a caveat against granting probate, and swore himself to be a creditor, there went out a commission of appraisement, till the return whereof the judge had not used to grant probate; and then set out that two creditors had entered a *caveat*, and prayed such a commission, which was decreed, and was not yet returnable: the Queen's Bench held the return to be ill, because the practice of the ecclesiastical court will not alter the law of the land (k).—ED.]

The manner and form of proving testaments is of two sorts: the one is called the vulgar or common form; the other is termed the solemn form, or form of law (l).

Two Manners of proving the Will.

The vulgar or *common form* is more compendious or brief than the other: for after the death of the testator, the executor presenteth the testament to the judge; and in the absence, and without citing or calling of such as have interest, produceth witnesses to prove the same; who testifying upon their oaths *vivâ voce*, that the testament exhibited is the true, whole, and last testament of the party deceased, the judge doth thereupon

I. Probate in common Form.

(f) Treat. of Eq. b. 4, c. 1, s. 4; *Broker v. Charter*, Cro. Eliz. 92; Toller, 41.

(g) *Gibs*, 469.

(h) *Rex v. Dr. Hay*, Bur. Mansf. 2295; [*Lovegrove v. Bethel*, 1 W. Bl. 668.]

(i) [See the case of *Rex v. Raines*, 1 Ld. Raym. 361, *post*, "*Administration Bond*."]

(k) [*Rex v. Betterworth*, Stark.

857. See title *Prohibition*, vol. iii. The Court of Chancery will control an insolvent debtor by the appointment of a receiver, *Rex v. Simpson*, 1 W. Black. 458; *Uterson v. Moir*, 2 Ves. jun. 95, and *vide supra*.]

(l) Swin. 448. [It seems to be held by the authorities at Doctors' Commons, that the new Will Act has made no alteration in this respect.—

ED.]

1. Probate in
common
Form.

(and sometimes upon lesser proof) annex his probate and seal to the testament, whereby the same is confirmed (*m*).

[No paper that is of a testamentary nature should be withheld from the court (*n*).—ED.]

It is not necessary to the proof of a written will, that the witnesses hear it read, so as they can depose that the testator declared before them, that the self-same writing now produced is or was his last will and testament (*o*).

In *Longford v. Eyre* (*p*) it is said, that in proving a devise of lands, the proper way is, that the witness should not only prove the executing the will by the testator, and his own subscribing in his presence, but likewise that the rest of the witnesses subscribed their names in the testator's presence: and so one witness proves the full execution of the will.

But in the case of *Townsend v. Ives*, May 9, 1748, at the Rolls (*q*): A bill was preferred by the legatees to have the real estate sold for the payment of their legacies which were charged thereupon, against the heir at law of the testator, who is an infant, and to have the will established. There were three witnesses to the will all now living, but only one has been examined, who proved the execution of it, and the attestation of the other two witnesses. But Fortescue, Master of the Rolls, refused to establish the will, without the examination of all the witnesses: for it is a rule that all the witnesses, if living, must be examined to prove the will. Besides, the heir at law is in this case an infant, who, if of age, has a right to cross-examine all the witnesses. And as no admission of this sort can be received for an infant, this court must protect his right, and therefore must insist upon all those requisites which he would have a right to insist upon if he were of age, and capable of making a defence for himself.

So in *Ogle v. Cook*, Dec. 10, 1748 (*r*): Upon a bill for establishment of a will and performance of the trust, it was objected, that only two of the witnesses to the will were examined, and some account ought to be given why the third was not, as that he could not be found, or the like. Lord Hardwicke held it necessary to the establishment of a will; for if after the decree the heir at law should controvert it, the court would order an injunction: nor did he care to make a precedent to the contrary; for if this other witness were called, he might say something material against it: and therefore ordered it to stand over till the third was examined.

E., 12 Geo. 2, *Croft v. Paulet* (*s*). On a trial at bar in ejectment, the defendant made title under a will, the attestation of which was in these words, "signed, sealed, published, and

(*m*) Swin. 448.

(*n*) [*Langmend v. Lewis*, 2 Phill. 325; and see title *Practice*, vol. iii.]

(*o*) God. O. L. 66.

(*p*) 1 P. Wms. 741.

(*q*) 1 Wilson, 216.

(*r*) 1 Ves. 177.

(*s*) Str. 1109; [see Phillipps on Evidence, vol. i. chap. 8, s. 2, Of the Proof of Wills.]

declared as and for his last will and testament, in the presence of us, A., B. and C.” The will was in 1723, and the witnesses were all dead, and their hands proved in common form. But then it was objected, that this was not an execution according to the statute; and the hands of the witnesses could only stand as to the facts they had subscribed to, and signing in the presence of the testator was not one. But the court, on the authority of a case in the Common Pleas, said it was evidence to be left to a jury of a compliance with all circumstances. And a verdict was given for the will.

I. Probate in
Common
Form.

Generally by the civil law, the testimony of two witnesses is required; and if in the probate of a will the testimony of one witness is disallowed in the ecclesiastical court, a prohibition lieth not: for that court having jurisdiction of the matter, hath it also as to the manner of proof and proceedings (*t*).

But Dr. Godolphin says, where there is no controversy or dispute touching the will, there the single oath of the executor alone is sufficient for the probate thereof in common form (*u*).

And this, it is said, is the practice throughout the province of Canterbury: but within the province of York it hath been usual (though now discontinuing in some of the dioceses) to swear also one witness to the will.

[The foregoing observations apply to testamentary papers which on the face of them are *perfect*. *Imperfect* papers may be also proved in common form, provided, *first*, that they be accompanied with affidavits, stating such a case as, if proved by depositions, would establish them as a will (*x*); *secondly*, that these be also accompanied with the consent, implied or expressed, of all parties interested (*y*). On this principle the consent of the court must be obtained in cases of illegitimate testators (*z*). The court is very jealous in the maintenance of this latter rule in a case where minors are interested; their incapacity to give a proxy of consent renders it very difficult in a case wherein they are interested to obtain a probate of an imperfect instrument (*a*), and issue born after probate are not bound by the decree of the court. The necessity of consent of parties interested is equally stringent where the instrument appears from erasures or interlineations to be *primâ facie* deliberative (*b*).

[With respect to wills executed since the passing of 1 Vict.

(*t*) 2 Rolle's Abr. 300.

(*u*) God. O. L. 65.

(*x*) [In the goods of Tolcher, 3 Add. 16.]

(*y*) [In the goods of James Thomas, 1 Hagg. 695; In the goods of John Edmonds, id. 698; In the goods of Hurrill, id. 252; In the goods of Wenlock, id. 551; In the goods of Elizabeth Addams, 3 Hagg. 258.]

(*z*) [In the goods of Robinson, 1 Hagg. 643.]

(*a*) [In the goods of James Gibbs, 1 Hagg. 376; In the goods of Hugh Ross, id. 471; In the goods of Thomas, id. 695; Ravenscroft v. Hunter, 2 Hagg. 68.]

(*b*) [Braham v. Burchell, 3 Add. 254; In the goods of Herne, 1 Hagg. 222.]

I. Probate in
Common
Form.

c. 26, where there is an attestation clause, reciting that the formalities required by the 9th section of that act have been complied with, the practice of the Prerogative Court of Canterbury is to allow probate to pass in common form upon the oath of the executor alone. But if such an attestation clause be wanting, an affidavit is required from one of the subscribing witnesses, that the injunctions of the statute have been complied with. If a will dated before the passing of the act bear upon the face of it unattested obliterations or alterations, an affidavit is required that they were made before 1st January, 1838, otherwise probate will go of the will as it originally stood (*c*). If a will made since the passing of the act show upon the face of it unattested alterations, if the original words can be deciphered, probate will pass of the will with them, or if they cannot be deciphered, probate will pass in *fac simile* or in blank (*d*).—ED.]

II. Probate in
Solemn Form
of Law.

When the testament is to be proved in *form of law*, it is requisite that such persons as have interest, that is to say, the widow and next of kin to the deceased, to whom the administration of his goods ought to be committed if he had died intestate, are to be cited to be present at the probation and approbation of the testament, in whose presence the will is to be exhibited to the judge, and petition to be made by the party which preferreth the will, and enacted for the receiving, swearing and examining of the witnesses upon the same, and for the publishing or confirming thereof; whereupon witnesses are received and sworn accordingly, and are examined every one of them secretly and severally, not only upon the allegation or articles made by the party producing them, but also upon interrogations ministered by the adverse party, and their depositions committed to writing: afterwards the same are published, and in case the proof be sufficient, the judge doth by his sentence or decree pronounce for the validity of the testament (*e*).

How it differs
from Probate
in Common
Form.

Which difference of form in proving the will worketh this diversity of effect, namely, that the executor of the will proved in the absence of them which have interest, may be compelled to prove the same again in due form of law; and if the witnesses be dead in the mean time, it may endanger the whole testament, especially if ten years be not past since the probation, whereby necessary solemnities are presumed to have been observed: whereas the testament being proved in form of law, the executor is not to be compelled to prove the same any more; and although all the witnesses afterwards be dead, the testament doth still retain its full force (*f*).

But probably this word *ten* in figures may have been mistaken for *thirty*; for Dr. Godolphin says, the will being

(*c*) [*In the goods of Wickey*, Feb. March, 1839.]
2nd, 1839.] (*e*) Swin. 448, 449.
(*d*) [*In the goods of Rippetts*, 19th (*f*) Ibid. 449.

proved only in common form, it may be questioned at any time within thirty years next after by common opinion before it work prescription (*g*).

II. Probate in Solemn Form.

[But it was said by a very eminent judge, “I do not know that there is any specific time which limits a party (*h*). In *Satterthwaite v. Satterthwaite* (*i*), probate of a codicil granted in common form in 1808 was upon the citation of the executor by next of kin to prove it *per testes*, in due form of law revoked in 1818; and in *Finucane v. Gayfere* (*k*), a probate granted in common form in 1807 was revoked by a similar process in 1820. So in *Lest v. Brown and others* (*l*), probate of a former will was revoked in order that probate might be given to a later will; and in *Murphy v. Mason and Fennel* (*m*), on a failure of proof of the identity of the testator.—ED.]

And this proving of the will in solemn form is for the most part at the instance of some person who desireth to invalidate the same; in which case his proctor, at the time of exhibiting the will, ought to accept the contents thereof so far forth as it maketh for the benefit of his client; otherwise if any legacy is given to him in the will, he shall lose it for his general impugning of the will (*n*).

And in such case where an executor hath been called to prove the will by witnesses, and hath fully proved it, if the party who caused him to do this shall not, after publishing the attestation, except against the will or the witnesses, nor propose any matter to hinder the passing of sentence for the validity of the will, the judge doth not usually condemn him in costs: but otherwise it is if he shall propose such matter and fail in the proof; for then he will be condemned in costs, at least from the time of such proposal (*o*).

[The next of kin merely, as such, are entitled of common right to call for proof in solemn form of the deceased's will; and it has been held, that a next of kin who has acquiesced in probate taken in common form, and has even received a legacy due to him as under the will, may still be at liberty to call in such probate and put the executor on proof *per testes*, first bringing in the legacy so received (*p*); but he has been held to be barred from calling it, as where he has been cognisant of a prior suit in which the validity of the same will had been contested by other parties (*q*). And long acquiescence, for which there appears no reason, may bar a next of kin of his rights. The principles which govern the Court of Probate in such case are laid down by Sir William Wynne with the

Rights of next of Kin.

(*g*) God. O. L. 62.

(*h*) [*Hoffman v. Morris and White*.

Sir W. Wynne, note to *Nevell v. Weeks*, 2 Phill. 231.]

(*i*) [3 Phill. 1.]

(*k*) [*Ibid.* 405.]

(*l*) [1 Lee, 433.]

(*m*) [*Ibid.* 349.]

(*n*) [1 Ought. 21.]

(*o*) [*Ibid.* 20.]

(*p*) [*Bell v. Armstrong*, 1 Add. 365; *Braham v. Burchell*, 3 Add. 256; *Gascoyne v. Chandler*, 2 Lee, 242.]

(*q*) [*Newell v. Weeks*, 2 Phil. 224.]

II. Probate in
Solemn
Form.
Rights of
next of Kin.

clearness and strength which characterized all the decisions of this learned judge. In the case of *Hoffman v. Norris and White* (r) he remarked, "George Hoffman made his will in May, 1791, disposing of real and personal property between a brother and sister, and excluding his brother Lewis Hoffman for reasons mentioned; he died in 1795. In March 1795 the will was proved by the two executors: doubts having arisen respecting the will, a suit in Chancery was brought against the executors and against Lewis Hoffman, praying an account, &c.; this was answered by all the parties. Lewis Hoffman, in his answers on the 26th of January, 1796, stated that he believed the deceased had made his will as set forth; that the will was duly proved; and he claimed all such right as he was entitled to as brother and next of kin; particularly submitting whether a legacy did not lapse, and that he was so entitled. On the 26th of June, 1796, the master decreed accordingly; and that, by the death of William Hoffman, the legacy had lapsed, and consequently was distributable; and that *one-third* of *one-half* belonged to Lewis Hoffman; pursuant to this the money was laid out, and Lewis Hoffman received the interest of the one-third of the moiety proceeding under the will, as if the legacy had lapsed. In 1804 a decree was taken out in this court by Lewis Hoffman against the executor of his brother's executor, to bring in the probate and prove the will. There can be no doubt but that as a brother he is entitled to controvert the will; and if probate has been obtained in common form, he can call it in and put the executor on proof. I do not know that there is any specific time which limits a party. The will had been proved in 1795; this decree was taken out in 1804, so that there had been a quiet possession for nine years. I think I know instances in which the court has allowed the probate to be called in after a longer time; that may be done with cause shown: that it may be done under any circumstances is what I cannot admit: it would be contrary to reason and every principle of justice. Where the opposing party has been in a situation which rendered it impossible or difficult for him to have proceeded earlier; if he has been absent from the country, a minor, or labouring under imbecility, he may be admitted. But without reason, and where there are such strong reasons as there are here to show that he was not in such a state of incapacity as to have prevented him, and further that he could not be ignorant of all the circumstances relating to the deceased, from the suit in chancery soon after the probate was taken out, the case is different. By his answers he admitted both the will and the probate: a decree was made operating on the lapsed legacy; and he acted under that decree not upon an intestacy, and continued to receive the interest for five years together, not offering to bring up what he has received, but stating only

(r) [2 Phil. 230.]

that he had strong reasons to doubt, but did not know that he could call them in question after probate; ignorance of the law is not an excuse; but this is so plain; and, having advice as to the deceased's affairs by the suit in Chancery, I cannot admit this. He speaks of additional facts; but this is mere general assertion; there is little reason to think that a will written with the deceased's own hand in the East Indies, he having lived in this country four or five years afterwards, could be improperly obtained. I dismiss the suit with costs."

II. Probate in Solemn Form. Rights of next of Kin.

[But a legatee who has renounced administration *cum testamento annexo* is not barred by such renunciation from contesting the will, and he may cite the administrator to bring the letters of administration into court (s).

[A next of kin in possession of an administration, and himself called upon to see a will propounded by an executor, may take out a decree, citing all persons interested under the will to see proceedings (t).

[A creditor cannot dispute the validity of a will unless he has had a grant of administration (u), in which case he is the same for the purpose of opposing the will as a next of kin (x).

Intervener.

[Where a will has been litigated between the executor and next of kin or another executor, and pronounced against, it cannot be set up by a legatee unless he can show fraud or collusion, or neglect and mismanagement, in the former parties; but he may intervene pending the suit (y).

Creditor.

[*Menzies v. Kerr* (z). This was a question arising out of a proceeding to obtain probate of the will of a Mr. Fraser, who died on the 3d of June, 1839, the question being simply whether a creditor could appear as a contradictor to a will, and put a party alleging an interest upon proof of the same. The question was argued during the last term; and on August 3, 1841, Sir H. Jenner gave sentence, to the effect that, according to the rule and practice of this court for many years back, and also upon principle, a creditor could not be allowed, as a matter of right, to appear and put an alleged executor upon proof of the will. All a creditor required was to have a representation, and having got that, as Sir William Wynne had said in one of the cases, "he had got all he wanted." If one creditor had a right to oppose the grant of a probate, another had, and there would be no knowing where to stop; and as executors must also have a right to oppose the interest of a creditor, the court would have to determine the validity of his debt, and be led into questions out of its jurisdiction. He rejected the petition

(s) [*Gascoyne v. Chandler*, 2 Lee, 241.] Edward Simpson's note.]

(t) [*Colvin v. Fraser*, 1 Hag. 107.]

(u) [*Burroughs v. Griffiths*, 1 Lee, 544.]

(x) [1 Phil. 160, 161, note; Sir

(y) [*Bittleston v. Clarke*, 2 Lee, 250; *Hayle v. Hasted and Pierson*, 1 Curt. 236, 240. As to costs, see title *Practice*, vol. iii. p. 337.]

(z) [August 3, 1841, Prerog.]

II. Probate in
Solemn
Form.

of the creditor, and condemned him in the costs of the opposition.—ED.]

But where the parties interested do not call the executor to prove the will in solemn form, yet the executor himself may cause the will to be proved in this manner: as where an executor hath the greatest part of the goods of the deceased bequeathed unto himself, and he doubteth after the witnesses shall be dead, that the wife or children or other kindred of the deceased will contest the validity of the will, he may cite them in special (and all others pretending interest in general, and so is the usual practice) to see the will proved by the witnesses; which being done, the will shall not be set aside afterwards (provided there hath been no irregularity in the process) when the witnesses are dead (*z*).

Where the executor is infirm, or lives at a great distance, it is usual to grant a commission to some grave clergyman in the neighbourhood, to administer the oaths, and perform the other requisites for granting probate of the will; so also in the granting of administration (*a*).

7. Miscel-
laneous
Points.

If the executor die intestate, the testator also from that time shall be deemed intestate, and administration may be committed in this case of the goods not administered (*b*).

Executor
dying.

But if the executor maketh an executor and dieth, his executor shall be executor to the first testator, in case there be no executor (*c*).

And if the executor of an executor assume the administration of the first testator's goods, he cannot afterwards refuse the administration of the goods of the latter testator; but he may accept the latter, yet refuse the former (*d*). [This is not, whatever it may have been, good law. It was attempted to be established in a recent case; but Sir H. Jenner observed, "It has been for many years the practice in this court, that an executor, taking probate of the will of an executor, becomes executor of the will of the first testator, and is not permitted to renounce probate of the first will, and take probate of the second. I am not aware of any instance of departure from this rule, and unless there be some clear principle or authority, the general rule of practice must be observed."—ED.]

Where the executor dies before the proving of the will, his executor cannot take upon himself the execution of the first will, but administration of the goods of the first testator, with the will annexed to it, is to be committed to the executor of the executor, if the residue of the goods of the first testator (the legacies performed) were bequeathed by his last will to the first executor; or [else] to such other person or persons to whom the said residue is bequeathed; otherwise to the next of blood to the

(*z*) 1 Ought. 20.

(*a*) 1 Ought. 322; [Can. 132; see title *Practice*, GENERAL PART, *Orders of Court*.—ED.]

(*b*) Swin. 382; 1 Rolle's Abr. 907.

(*c*) Swin. 329.

(*d*) T., 17 Jac., *Wolfe v. Heyden*, Hutt. 30; [14 Cro. Jac. 614.]

first testator demanding it. And this (*ex relatione* Dr. Drury, judge of the Prerogative Court of Canterbury) is the usage and custom of the said court, and agreeable to law, as seemed to him, to which the court gave credit(*e*).

[Therefore, if the person appointed executor *dies before the testator*, there must be administration *cum testamento annexo* (*f*).

[A married woman being executrix may continue the chain of representation by making her own executor (*g*).

[If there are several executors appointed and one of them dies leaving one or more of his co-executors living, no interest in the executorship is transmissible, except to the executor of the survivor(*h*); and the case where there are several executors, and one alone proves the will, the rest renouncing before the ordinary, is governed by the same rule of law (*i*).—ED.]

E., 4 & 5 Ph. & Mary (*k*). Two executors, one of them proved the will, the other refused before the ordinary, who thereupon granted administration to the other, who made his executor, and died; and that executor alone brought an action of debt, for a debt due to the first testator, and adjudged, that the action did lie; for though he who refused might administer at any time, yet it must be in the lifetime of his companion, and he being dead, that election is gone.

Tingrey v. Brown (*l*). In this case the testatrix by her will made Francis Tingrey her sole executor, who proved the will, and afterwards died intestate; the plaintiff took out administration of his effects, but it was held that she could not sue the defendant for the double value of lands held over after notice to quit under a demise from the testatrix contrary to the 4 Geo. 2, c. 28, without taking out administration *de bonis non*, even though the tenant had attorned to her (*m*).

Besides these forms of proving testaments above recited, which are referred to that kind of probation which is called the publication of the testament, there is yet another form which is called the opening of the testament, which form doth respect written or closed testaments, in the making whereof the civil law did require that the witnesses should put to their seals; and after the death of the testator, at the opening of the written or closed testament, the same law did also require that the same witnesses should be called by the magistrate to acknowledge their seals, or to deny their sealing. But as we do not observe

Apertura Testamenti of the Civil Law.

(*e*) [*Isted v. Stanley*,] Dyer, 372; [*Hayton v. Wolfe*, Cro. Jac. 614; *Wankford v. Wankford*, 1 Salk. 308; *Anon.*, 3 Salk. 21. *Vide infra*, "Administration."]

(*f*) [*Brown v. Poyns*, Sty. 147; *Pullen v. Sergeant*, 2 Ch. Rep. 300.]

(*g*) [*Birkett v. Vandercom*, 3 Hagg. 750; *Barr v. Carter*, 2 Cox, 429.]

(*h*) [*Wentw. Off. Ex.* 215, 14th ed.; *In the goods of W. Smith*, Jan. 15, 1842; *Jurist*, vol. vi. p. 41.]

(*i*) [*Arnold v. Blencowe*, 1 Cox, 436.]

(*k*) Dyer, 160.

(*l*) 1 Bos. & Pul. 310.

(*m*) [*Vide infra*, "Inventory and Getting in the Effects."]

that solemnity of the civil law in the sealing of the testaments by the witnesses, no more do we observe that solemnity which the civil law requireth in opening of testaments sealed, unless this may seem to have some resemblance with this third form about the opening of the testament, which is enacted by the statute of the 21 Hen. 8, c. 5, s. 5, which saith, that “the bishop, ordinary, or other person having authority to take probate of testaments, shall, upon the delivery of the seal and sign of the testator, cause the same seal to be defaced, and thereupon incontinent redeliver the same seal unto the executor or executors, without claim or challenge thereunto to be made (m).”

Will lost and
Copy proved.

Dr. Swinburne says (n), if a testament be made in writing, and afterwards be lost by some casualty, yet if there be two witnesses, [that is, in the case of goods and chattels], which did see and read the testament written, and do remember the contents thereof, these two witnesses so deposing of the tenour of the will are sufficient for the proof thereof in form of law, so that they be otherwise as well in respect of their skill as of their integrity, greater than all exception, and specially some other likelihoods concurring therewithal to make their testimony more credible.

[In *Trevelyan v. Trevelyan* (o), Sir John Nicholl said,—“There can be no doubt in law that if a will duly executed is destroyed in the lifetime of the testator without his authority, it may be established upon satisfactory proof being given of its having been so destroyed, also of its contents.

[“The question then comes to the facts, and in this case there is abundant proof of the execution and contents of the instrument, as well as of the destruction of it without the authority or knowledge of the deceased. It is not necessary to decide whether the court could receive evidence against the fact of execution on the ground that the transaction was throughout a jest; it would be very dangerous to admit any such evidence of intention against the act; though there might be such a possible case, especially if the paper itself contained any thing ludicrous or absurd in its dispositions; against this instrument this species of argument cannot be maintained with effect, for the property is bequeathed to the testator’s own nephew and godson.

[“It appears also from the evidence of Mr. Stackpoole that the deceased was very serious in this disposition of his property; the codicils too are a complete recognition and proof also that he had no knowledge or idea of the destruction of the paper.

[“Under such proof the court is bound to pronounce for the will ‘as contained in the deposition of the witness,’ (this is

(m) Swin. 450.

(n) Ibid.

(o) [1 Phil. 153.]

the mode I believe which has been adopted on similar occasions), and for the two codicils which are sufficiently proved."

[Whenever, as in the foregoing case, the substance or contents of a will are established, the instrument itself being lost, satisfactory proof of the most stringent kind (*p*) must be given of its former existence; it must be proved, as in the case of *Martin v. Laking* (*q*), to have existed after the death of the testator; or, as in *Davis v. Davis* (*r*), to have been destroyed without his privity or consent during his life. Probate has been granted of the substance of a will torn to pieces by rats, as far as it could be collected from the memory of witnesses and the pieces joined together (*s*); and of a will wrongfully torn by testator's son, the substance of which was collected in the like manner (*t*).

[Sometimes in these cases the court prefers granting administration with the will, as contained in the affidavits annexed, and generally requiring justifying securities (*u*).

[If the court be satisfied that a clause has been inserted in a will by fraud, without the privity of the testator during his lifetime (*x*), or after his death by forgery (*y*), it will decree probate with a reservation of such clause.

[By 7 & 8 Geo. 4, c. 29, s. 22, it is enacted,—

[“That if any person shall, either during the life of the testator or testatrix, or after his or her death, steal, or for any fraudulent purpose destroy or conceal, any will, codicil, or other testamentary instrument, whether the same shall relate to real or personal estate, or to both, every such offender shall be guilty of a misdemeanour, and, being convicted thereof, shall be liable to any of the punishments which the court may award, as hereinbefore last mentioned; and it shall not in any indictment for such offence be necessary to allege that such will, codicil, or other instrument, is the property of any person, or that the same is of any value.”

7 & 8 Geo.
4, c. 29.
The stealing,
&c. of Wills.

[Where the former part of a will has been executed while the testator was capable, and the latter part while he was incapable, the court has ordered the will to be engrossed without the latter part, and so annexed to the probate (*z*).

Probate of
Part of a
Will.

[It should seem, however, from the case of *Curtis v. Curtis* (*a*), that the court cannot expunge words from a will. It

(*p*) [*Huble v. Clark*, 1 Hagg. 115.] copies of wills.—ED.]

(*q*) [1 Hagg. 244.]

(*r*) [2 Add. 224.]

(*s*) [Toller, 70.]

(*t*) [*Foster v. Foster*, 1 Add. 462;

see also *Knight v. Cook*, 1 Lee, 413;

Martin v. Laking, 1 Hagg. 244;

Parker v. Hickmott, *ibid.* 211; *In*

the goods of Harvey, *ibid.* 575; and

the last case, *In the goods of Cousins*,

Jurist, vol. vi. p. 40, for case where

probates were granted of drafts and

(*u*) [*Vallance v. Vallance*, 1 Hagg. 693; *In the goods of Campbell*, 2 Hagg. 555.]

(*x*) [*Barton v. Robins*, 3 Phillim. 455, n. (b).]

(*y*) [*Plume v. Beale*, 1 P. Wms. 388.]

(*z*) [*Billingham v. Vickers*, 1 Phillim. 187; *Wood v. Wood*, *ibid.* 357.]

(*a*) [3 Add. 33.]

Probate of
Part of a
Will.

may grant a limited probate where the testator has limited the executor (*b*).

[But where there is one executor appointed without any limitation, the court of probate can only pronounce for the will or for an intestacy (*c*).

[In general cases, if the will be limited to any specific effect of the testator, the probate shall also be so limited, and an *administratio cæterorum* granted (*d*).

[The office of executor being transmissible, the executor of an executor need not take out a new probate of the original will (*e*).—ED.]

6. Execu-
tor's Oath
to render
a just Ac-
count.

By a constitution of Archbishop Stratford (*f*), "After the testament shall be proved according to custom before the ordinary, the execution or administration of any goods shall not be committed but to such as shall faithfully promise to render a just account of their administration when they shall be thereunto duly required by the ordinary."

Shall faithfully promise.]—And that by oath, saith Lindwood, which may be before the administration (*g*).

And Swinburne says (*h*), in what manner soever the testament be proved, the executor, before he be admitted by the ordinary to execute, and before he have the will under the seal of the ordinary, is to promise, by virtue of his oath, to make a true account when he shall be thereunto lawfully called by the ordinary.

By the ancient canon law, a proctor having a special proxy might make oath instead of the executor or administrator, and swear upon the soul of his client: but now, by Can. 132, it is ordained that "Forasmuch as in the probate of testaments and suits for administration of the goods of persons dying intestate, the oath usually taken by proctors of courts *in animam constituentis* is found to be inconvenient, therefore, from henceforth, every executor or suitor for administration shall personally repair to the judge in that behalf or his surrogate, and in his own person (and not by proctor) take the oath accustomed in these cases. But if by reason of sickness or age, or any other just let or impediment, he be not able to make his personal appearance before the judge, it shall be lawful for the judge (there being faith first made by a credible person of the truth of his said hindrance or impediment) to grant a commission to some grave ecclesiastical person, abiding near the party aforesaid, whereby he shall give power and authority to the said ecclesiastical person, in his stead to minister the accustomed

(*b*) [*Sutton v. Smith and others*, 1 Lee, 280.]

(*c*) [*Sutton v. Smith*, 1 Lee, 275; *Spratt v. Harris*, 4 Hagg. 408.]

(*d*) [Toller, 67; Went. Off. Ex. 30, 14th ed.]

(*e*) [*Wankford v. Wankford*, 1 Salk. 309.]

(*f*) Lind. 177.

(*g*) Ibid.

(*h*) Swin. 451.

oath above mentioned to the executor or suitor for such administration, requiring his said substitute, that by a faithful and trusty messenger he certify the said judge truly and faithfully what he hath done therein."

Which oath, to be administered to the executor, is usually in this form:—

"You shall swear, that you believe this to be the true last will and testament of A. B., deceased, that you will pay all the debts and legacies of the deceased as far as the goods shall extend, and the law shall bind you; and that you will exhibit a true, full and perfect inventory of all and every the goods, rights and credits of the deceased, together with a just and true account, into the registry of the — Court of — when you shall be lawfully called thereunto. So help you God."

By the same constitution of Archbishop Stratford, "after the testament shall be proved according to custom before the ordinary, the execution or administration of any goods shall not be committed but to such as are able, and if need be, shall give sufficient security, to render a just account of their administration, when they shall be thereunto duly required by the ordinary (i)."

9. Bond to the like purpose.

And Lindwood hereupon observeth (k), that it seemeth hereby that the ordinary may remove the executor appointed by the testator, from the administration, especially where there is just cause, as where he cannot give security for a due account.

And Swinburne says (l), the executor (if it be behoveful) shall enter into bond to make a true account when he shall be thereunto lawfully called by the ordinary.

But in the case of the *King v. Sir Richard Raines*, M., 10 Will. 3 (m), a mandamus was directed to Sir Richard Raines to command him to grant probate of the will of Edith Pinfold to one Richard Watts, who was made executor of it. Sir Richard Raines makes return to it, and admits that Edith Pinfold made her will, and Watts executor of it; but says further, that it clearly and judicially was proved and appeareth to him, that Watts is worth nothing, but absconds for debt; and therefore that it is lawful to him to defer the granting of the probate until Watts find sufficient security to perform the intent of the will. And it was argued by Sir Bartholomew Shower, Mr. Montague, and Dr. Waller, the king's advocate-general, (a civilian,) that this return was good, and that a peremptory mandamus ought not to be granted. And Dr. Waller said, that in fact the case was thus: Edith Pinfold made her will, and Richard Watts, her nephew, her executor; and devised to him 100*l.* for a legacy, and some cattle; she devised also to Baines her brother 500*l.*, and the residue of her personal estate to the son of Baines. The will was brought by Baines to the

(i) Lind. 177.

(k) Ibid.

(l) Swin. 451.

(m) Ld. Raym. 361; S. C. 1 Salk. 299; Stra. 672.

Bond of
Executor.

Prerogative Court to be proved; and it was opposed by one Huntley, but the cause was not promoted at all by Watts. Sentence passed in the Prerogative Court for Baines; upon which Huntley appealed to the Delegates, and the sentence there was confirmed; whereupon the will was returned into the Prerogative Court, and then Watts claimed probate; but upon examination it appeared to the judge that he was an insolvent and necessitous man, and had received his legacy, and therefore the judge required caution; upon which Watts obtained this mandamns, and to it the judge made this return, which (by Dr. Waller) is good: For if there is any default in the judge in the administration of his office, it is a proper subject for an appeal; for this will, being of chattels, is altogether of ecclesiastical cognizance; and therefore, as the spiritual judge shall determine concerning the validity of the will, so he ought to make a judgment whether he ought to grant probate of it or administration; or, if the executors be conditional, as it may be, whether the condition be performed, or the like: in all which cases, if he makes a false judgment, the proper remedy is by appeal, and not to come in this manner for remedy to the King's Bench. He argued further, that the judge had done nothing in this case but what he ought to do; for in such cases he may properly require caution. In the time of the heathen emperors, the testaments were reposed in the colleges of the *pontifices*; and from the time that the emperors became Christian, the bishops were entrusted with them. Now the civil law was, that security should not be demanded *de hærede*, which at that time included what we now call executor, unless he was insolvent; and then it was lawful to demand caution or security. But after this the canon law followed; and then they made use of the word executor, which was before included in the word heir; and of them there are three sorts; first, *legitimus*, to wit, the ordinary; secondly, *datus*, namely, he whom the ordinary appoints, and he always gives security; thirdly, *testamentarius*, who came instead of the heir, which is he whom we call executor by way of pre-eminence. And then, as the heir before, if he was insolvent, always gave caution, so, for the same reason, an insolvent executor always gives caution. To say the truth, there is a difference made, when the testator knew at the time of the making his will that the person whom he constituted executor was then insolvent, and when the executor is become insolvent by matter *ex post facto*; but at what time Watts became insolvent doth not appear in this case; and therefore, to justify the acting of a judge, the court will intend, if it be material, that he became insolvent since the death of the testatrix, rather than at the time of the will made. In Lind. 167, it is said that no religious person shall be executor, unless his superior takes care to give caution for the due execution of the will, and for the loss that may

happen by his administration; and Lindwood gives the reason of it, because it appears that such a person is insolvent; which proves that insolvent persons ought to give caution. So Lind. 177: Before the executor be admitted by the ordinary to execute the will, he ought to take an oath (which is the constant practice, and yet no mention is found of such oath, before that which these constitutions in Lindwood make of it; and yet before the late statute, if Quakers refused to take such oath, no probate of any will used to be granted to them); and, *if need be*, says Lindwood, he shall give sufficient caution. To the same purpose Swinburne says, that the executor, if it be behoveful, shall enter into bond. To which Sir Bartholomew Shower added, that if an executor is *non compos*, the ordinary is not bound to grant probate to him, because he hath an apparent disability to execute the will, which strongly resembles this present case. Also, he said, that if the executor refuses to take the oath, this amounts to a refusal of the office, and the ordinary may grant administration with the will annexed. Why then shall not the refusal to give security amount to a refusal of the office of executor, since there is no positive law, that in such case the ordinary shall administer an oath, more than in this case that he shall demand caution? Further, he said that although mandamuses are granted oftentimes to compel the granting of administration, because they are founded upon the act of parliament which appoints the granting of administrations; yet one cannot find any precedents of mandamus to compel the judges at the civil law to execute their law, which seems to be the present case. Against this it was argued by Mr. Northey and Mr. Eyre, that the Prerogative Court cannot in such case require caution, for the same reasons that the court afterwards gave for the ground of their judgment, and therefore unnecessary to be repeated. And by Holt, Chief Justice: Wills and testaments are of ecclesiastical cognizance, not by force of the civil or canon laws (for they bind no farther here than as they have been received here), but by the law of the land. Then if the ecclesiastical courts proceed to enlarge the power of the judge, contrary to that which the common law allows, the King's Bench will prevent all sorts of encroachments. As if an executor be sued in the ecclesiastical courts to make distribution, he not being residuary legatee, though that were allowed by the canon law, yet the King's Bench would want a prohibition to stay any such suit; for all suits for distribution were prohibited by the King's Bench until the statute of the 22 & 23 Car. 2, c. 10, made them lawful. Dr. Waller has not quoted any canon law, that the ordinary in such case ought to take caution; and the common law will not permit him to exact security for the insolvency of the executor. For suppose in this case (as the fact is) the executor will not give security, and yet will not renounce the executorship, the

Bond of
Executor.

ordinary cannot compel him to give security. What must be done? Though a refusal of the oath amounts to a refusal of the office of executor (because the oath is allowed by the common law, for it is proper to take a promissory oath that he will execute the office justly which he is going to execute), yet the refusal to give security will not amount to a refusal of the office of executor; because it is against common right to require collateral security. Then the testament will continue in force; the ordinary cannot grant administration with the will annexed; and so there will be a failure of justice, nobody being capable to sue the testator's creditors. One half of what one finds in Lindwood is not the law of the land. And as to the case of religious persons, objected out of Lindwood, he said that if a monk be made an executor, he cannot accept the office without leave of his superior; and then if the superior gives him leave to be executor, without giving other collateral security, the superior by his leave given is become security; and if the monk commits a *devastavit*, the suit shall be against the abbot and the monk, and the execution will be of the goods of the house. And Turton, Justice, agreed with Holt, Chief Justice, in every thing. But Rokeby, Justice, seemed to be of opinion that the grievance in the present case would be properly remedied by appeal. And he said that in the province of York security was always given upon the granting of the probate of a will, without any dispute made about it. Upon which a day was given to Dr. Waller to certify the King's Bench, by producing precedents, whether the practice had been in the Prerogative Court to take caution in such case. At which day no precedent of it being shown, nor satisfaction thereof given to the court, Holt, Chief Justice, with the concurrence of the other judges, pronounced the opinion of the court, that a peremptory mandamus ought to be granted in this case, because the ecclesiastical court cannot require caution in this case: 1. For when a man is made executor, nobody can add qualifications to him other than those which the testator has imposed; but he shall be who and in what manner the testator shall judge proper. 2. The executor has a temporal right of which he is barred by the refusal of the probate, inasmuch as he cannot before probate sue in Westminster Hall. 3. *There are no precedents in the canon law to warrant this*; and the practice has been always contrary. And if any cases happen in which equity may be requisite, there is another channel here where it runs, without resorting to the spiritual court, namely, the Chancery. And a peremptory mandamus was granted. And the reporter says, Mr. Robert Eyre told him, that the Lord Chancellor Somers well approved of this resolution.

But after all, this adjudication proceeds upon a supposition, that there is no canon law which requireth such caution, and Lindwood's authority alone was not judged sufficient in this

case. But the aforesaid constitution of Archbishop Stratford is undoubtedly a part of the canon law, which requires, that *they shall give sufficient security, if need be*. In the province of York bond hath been usually given. But perhaps this might arise from the custom within that province, which continued down until the fourth year of King William, of reserving out of the effects of the deceased a rateable part for the wife and children, which the testator could not dispose of by will; and consequently, as to so much, it was an intestacy, which in some cases amounted to one-half, in others to two-thirds, of the whole personal estate.

Bond of
Executor.

And in the case of *Folkes v. Dominique*, T., 13 Geo. 2 (n), where the executor was under the age of seventeen years, the court allowed a bond [for due administration] given by the administrator with the will annexed, during the minority of the executor, to be good at common law, and not obtained by coercion.

All this being done, the bishop's officers are to keep the original will, and certify the copy thereof in parchment under the bishop's seal of office; which parchment, so sealed, is called the will proved (o). And the probate being obtained is conclusive as to the character of an executor (p).

Probate,
making out.

By the 2 & 3 Anne, c. 4, "In order to render it more easy for the clothiers and others to borrow money upon land security for the promotion of trade, it is enacted, that a memorial of all wills and devises in writing, whereby any honours, manors, lands, tenements and hereditaments within the West Riding of the county of York, may be any way affected in law or equity, may at the election of the party or parties concerned be registered in such manner as by the said act is directed; and every devise by will of the honours, manors, lands, tenements or hereditaments, or any part thereof, contained in any memorial so registered as aforesaid, that shall be made and published after the registering of such memorial, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration; unless a memorial of such will be registered as aforesaid. But this not to extend to copyhold estates, nor to leases at rack rent, nor to any lease not exceeding twenty-one years where possession goeth along with it."

Register of
Wills in par-
ticular Places.

By the 5 Anne, c. 18, there are some further regulations concerning the same.

The statute of the 6 Anne, c. 35, containeth regulations to the like purpose for the East Riding of the said county of York:

(n) Str. 1137. See *The King v. Sir Edward Simpson*, 3 Burr. 1463; 1 Bla. Rep. 456, *et supra*. [That the Court of Chancery considers an executor as a trustee, and if insolvent will compel him to give security before he

enters upon the trust, or appoint a receiver, *vide supra*, "Form and Manner." *Vide infra*, "Administration."]

(o) Bacon's Use of the Law, 160.

(p) *Griffiths v. Hamilton*, 12 Ves. 298.

which same regulations are also extended to the West Riding, in aid of the two former acts.

By the 7 Anne, c. 20, the like for the county of Middlesex.

By the 8 Geo. 2, c. 6, the like for the North Riding of the said county of York.

And by the 25 Geo. 2, c. 4, further regulations with respect to the county of Middlesex.

10. Probate
of a Will of
Lands not
Evidence.

The probate of a will, or a copy of the will out of the register of the spiritual court, are not to be allowed as evidence in the case of lands (*q*).

H., 7 Geo. 2, *Morse v. Roach and others* (*r*). In the Chancery: Before the year 1718, the method was to deliver out a will of land to be proved at trials, or on commissions, upon security. Since that the registers have refused to deliver out the will, but insist upon being paid for attending with it; and where it was wanted at a distance, their demands did run very high. In this case an order was made (upon producing three precedents) that it should be delivered out on security; it being a bill brought by creditors and legatees, who were not likely to suppress it.

Nov. 23, 1738, *Frederick v. Aynscombe* (*s*). A will was executed at Boulogne, and proved here in common form, and deposited in the Prerogative Court of Canterbury. One of the witnesses resided at Boulogne. On a bill brought to perpetuate the testimony to the said will, it was moved, that the register of the Prerogative Court, or the record keeper, might be ordered to deliver out to the defendant the original will, on his giving a reasonable security to return the same, after the examination of the witness at Boulogne. And it was directed by the Lord Chancellor Hardwicke, that the defendant should be at liberty to take out a commission to examine his witness at Boulogne; and it appearing that the defendant was the only devisee who could claim any real estate under the will, he ordered the will to be delivered out by the proper officer to a person to be named by the defendant, on his giving security, to be approved of by the Prerogative Court, to return the will in three months. He said, if the defendant had not been the sole devisee of the real estate, but there had been other persons under the will interested in it, and they had refused their consent, he would not have made this order; because the taking a will out of the kingdom is different from any former cases, they having gone no further than ordering them to different parts of England.

Probate of a
Will of Goods
and Chattels,
how far Evi-
dence.

The seal of the ecclesiastical court (as to goods and chattels) doth authenticate the will, and is not to be contradicted; because, as there is no way in the temporal courts to prove the

(*q*) *Dike v. Polhil*, *Ld. Raym.* 744.

(*r*) *Str.* 961.

(*s*) 1 *Atkyns*, 627.

will relating to chattels, it must go on in the spiritual court, and the determination must there be final. For the temporal court cannot make a judgment concerning the will contrary to what was made in the ecclesiastical court; and therefore, if a probate is shown under the seal of the ordinary, they cannot give in evidence that the will was forged, or that another person was executor, but they may give in evidence, that the seal was forged, or that there were *bona notabilia*, because it is not in contradiction to the real seal of the courts, but it admits the seal, and avoids it. And since the ecclesiastical court hath now the probate of wills settled by custom, the temporal court cannot prohibit them in their inquiries whether the testator was *compos mentis* or not, or whether the will be revoked or not, because that is necessary for authenticating the will (*t*).

Probate of the
Will of Goods
how far Evi-
dence.

During the existence of a probate, which is a judicial act of the ecclesiastical court, the courts of common law cannot admit evidence to impeach it, having no jurisdiction upon the subject; and therefore though the will be forged, and the probate afterwards revoked by the court that granted it, payment of money to the executor, while the probate was unimpeached, shall discharge the debtor, he being bound by the judicial act of a court having competent authority (*u*). But the jurisdiction of the ecclesiastical court commences only upon the death of the testator; and therefore if a probate of a forged will be procured during the lifetime of the supposed testator, it is a mere nullity, and need not be revoked, though the person forging it may be indicted for forgery (*x*). An anomalous case however exists on this subject, viz. *Barnsley v. Powel* (*y*); where the will appearing to have been forged, and the probate to have been obtained by a fraud on the plaintiff in procuring his consent to it, Lord Hardwicke, C., decreed that the defendant should consent to a revocation.

And by Holt, C. J.: "The judge of the spiritual court is the only proper judge to determine the validity of wills for things personal, and therefore the probate is undeniable evidence to a jury; and he said he remembered a case in the time of Lord Chief Justice Kelyng, where an executor brought an action, and at the trial produced the probate, and the defendant's counsel offered to prove, that the supposed testator died intestate; but Kelyng, C. J., told them, that the probate was evidence uncontrovertible; and with him concurred the other judges, and so it hath been always held since (*z*)."

But yet it is held, that if the probate of wills and granting administrations be traversed or denied in the king's courts, and issue joined, that the ordinary did not commit administration

(*t*) Str. 671, 672.

(*u*) *Allen v. Dundas*, 3 T. R. 125.

(*x*) See *Cogan's case*, in Leach's Crown Law, and *Duch. of Kingston's*

case, St. Tr.

(*y*) *Supra*.

(*z*) *Ld. Raym.* 262.

Probate of the
Will of Goods
how far evi-
dence.

to such a one, or that the testament is not proved before the ordinary, or that he whose will is proved before the ordinary died intestate, or that he of whose goods administration is granted as of one intestate made a will: in these and the like cases it is held, that certificate shall not be made by the ordinary, but that it shall be tried by jury; and the reason given for it is, that probate of wills and granting administration originally did not belong to the ecclesiastical cognizance, but were given to them of later times; and that therefore nothing but the probate and granting administration, which were given to them, doth appertain to their jurisdiction; but the *trial* thereof is not given to them, but is left to the trial of the common law (a).

But before this time (in the 31 Eliz.) in case of refusal or no refusal, how it should be tried, this distinction was laid down: where the issue is, whether the executor did refuse before such a day, or after, there the trial shall be by jury; contrary, where the issue is, upon refusal generally, because the refusal is before the ordinary as a judge. And the case then before the court being this, "That the bishop certified that he did not refuse, whereas in truth he had refused before the commissary:" the court held, that they could not write to the commissary, since the bishop and not he was the officer unto the court to that purpose, and that the party could not aver against the certificate of the bishop any more than against the return of the sheriffs (b).

M., 8 Geo. 1, *The King v. Vincent and others* (c). Indictment for forging a will relating to a personal estate; and on the trial a forgery was proved; but the defendant's producing a probate, that was held to be conclusive evidence in support of the will.

T., 12 Geo. 1, *The King v. Rhodes* (d). The defendant exhibited a will in Doctors' Commons as executor, and demanded probate. After a long contest there, it was determined in favour of the will; and upon appeal to the Delegates, the sentence was confirmed. Afterwards, the parties who had been concerned in cooking up the will fell out amongst themselves about the division of the estate; and thereupon it came out, that the will was forged; and upon full affidavits of the forgery, a commission of review (which it was agreed was the only method to bring the matter over again) was granted by the lords justices; and an indictment was also found for the forgery, and stood ready for trial in the King's Bench. Upon motion for a *habeas corpus ad testificandum*, Raymond, Chief Justice, declared, that he would not try the cause. For there being yet a sentence subsisting in favour of the will, and the validity of that being now put under a proper examination, he

(a) Gibs. 468; 9 Co. 40.

(b) Gibs. 468.

(c) Str. 481.

(d) Str. 703.

did not think it fitting to determine the property by an indictment, which would come on more properly after the sentence was reversed.

Probate of the Will of Goods how far evidence.

In *Goodrick's case*, at the Old Bailey, in 1784, it was the opinion of the judges that the trial for forgery should be postponed till the ecclesiastical court had determined upon the validity of the probate, cited in 3 Term Rep. 126 (e).

In the case of *St. Leger v. Adams* (f), Holt, Chief Justice, said, Without doubt the register's book in the spiritual court is good evidence to prove that there was a will, although it be lost.

And in the case of *Shepherd v. Shorthose*, H., 7 Geo. 1 (g), where the probate is lost, an exemplification of it from the act of the spiritual court hath been allowed as evidence of the will being proved.

H., 8 Will. 3, *Hoe v. Nelthorpe* (h). It was held by Holt, Chief Justice, that the copy of the probate of a will is good evidence, where the will itself is of chattels, for there the probate is an original taken by authority, and of a public nature; otherwise, where the will is of things in the realty, because in such case the ecclesiastical courts have no authority to take probates, therefore such probate is but a copy, and a copy of it is no more than the copy of a copy.

By the statute of the 4 Ann. c. 16, intituled An Act for the Amendment of the Law, and the better Advancement of Justice, "No advantage or exception shall be taken of or for the default of alleging the bringing into court letters testamentary; but the court shall give judgment according to the very right of the cause, without regarding any such imperfections, omissions and defect, or any other matter of like nature, except the same shall be specially and particularly set down and shown for cause of demurrer (i)."

By the 31 Edw. 3, st. 1, c. 4, "Whereas the ministers of bishops and other ordinaries of holy church, take of the people grievous and outrageous fines for the probate of testaments and for the making of acquittances thereof; the king hath charged the Archbishop of Canterbury and the other bishops, that they cause the same to be amended; and if they do not, it is accorded that the king shall cause to be inquired by his justices of such oppressions, and extortions, to hear them and determine them, as well at the king's suit, as at the suit of the party, as in old time hath been used."

11. Fee for Probate.

(e) See also Gilb. Eq. Cas. 207, 208; Palm. 163.

(f) Ld. Raym. 731.

(g) Str. 412.

(h) 3 Salk. 154.

(i) [See further on this subject, Mr. Phillipps' Work on Evidence, vol. ii. c. 3, s. 1, and Mr. V. Williams,

on Ex. and Ad. vol. i. book vi. c. 1. Of the effect of probate and letters of administration, so long as they remain unrepealed, and for cases on the operation of probates and letters of administration as evidence, see Harrison's Digest, vol. ii. p. 1073, c. 14, s. 6, title Evidence.—Ed.]

Fee for Probate.

By a constitution of Archbishop Mepham (*k*): "For the insinuation of the testament of a poor person, the inventory of whose goods shall not exceed 100s., nothing shall be demanded."

And by a constitution of Archbishop Stratford: "We ordain, that for the probation, or approbation, or insinuation of any testaments whatsoever, nothing at all shall be taken by the bishops or other ordinaries: but we permit 6*d.* and no more to be taken by clerks writing such insinuations, for their labour. But if the inventory of the goods of any person deceased do exceed the sum of 30s. in the computation, and do not extend to 100s.; the bishops or ordinaries, or persons deputed by them, and auditing the accounts, or other ministers assisting them in the auditing of such accounts, shall not take for the account, and doing all things concerning the same, and letters of acquittance, or other letters whatsoever, above 2*d.* And if the inventories contain the sum of 100s. or more, and less than 20*l.*, they shall not take above 3*s.* But if they contain the sum of 20*l.* or more, and less than 60*l.*, they shall not take above 5*s.* If they contain the sum of 60*l.* or upwards, and less than 100*l.* they shall have 10*s.* and no more. If they contain the sum of 100*l.* or more, and less than 150*l.*, they shall not take above 20*s.* And so for every 50*l.* further, they shall take, besides the said sum of 20*s.*, the sum of 10*s.* and no more. But we permit the clerks for every letter of acquittance which they shall write in this behalf, to take 6*d.* above the premises for their labour. And if any person in any the cases aforesaid shall take above the sum before ordained, in money or other things, he shall pay double within a month to the fabric of the cathedral church. And bishops neglecting to pay the same within the time limited, shall be prohibited *ab ingressu ecclesiæ*; and the other inferiors, neglecting the same as aforesaid, shall be suspended *ab officio et beneficio*, until they shall pay the same."

Probation.]—That is, taking the proofs (*l*).

Approbation.]—That is, the decree for the validity of the testament (*m*).

Insinuation.]—That is, publication thereof amongst the acts of the judge (*n*).

Do exceed the sum of 30s. in the Computation.]—Lindwood seems to resent this constitution, as arbitrary and unreasonable; and observes, that the officers of the court were left at liberty to demand what they would, when the inventory was under 30*s.* (*o*)

For their Labour.]—But if it shall happen that witnesses are to be examined, and their depositions to be taken in writing,

(*k*) Lind. 170.

(*l*) Ibid. 181.

(*m*) Ibid.

(*n*) Lind. 181.

(*o*) Ibid.

it seemeth that for this they shall be rewarded besides, according to the quantity of their labour. And the same is to be understood, if the testament be long in writing; and if it be to be registered, that then the register shall receive a reasonable satisfaction (*p*).

Fees for Probate.

By the 21 Hen. 8, c. 5, s. 2, it is enacted, that “ Nothing shall be demanded, received nor taken, by which any bishop, ordinary, archdeacon, chancellor, commissary, official, or any other person or persons who shall have power to take or receive probate, insinuation, or approbation of testament or testaments, by himself or themselves, nor by his or their registers, scribes, praisers, summoners, apparators, or by any other of their ministers, for the probate, insinuation, and approbation of any testament or testaments, or for writing, sealing, praising, registering, fines, making of inventories, and giving acquittances, or for any other cause concerning the same, where the goods of the testator or person so dying do not amount clearly over and above the value of 100s., except only to the scribe to have for writing of the probate 6*d.*, and for the commission of administration of the goods of any man dying intestate, not being above the like value of 100s. clear, 6*d.*; and that nevertheless the bishop, ordinary, or other person having power to take the probate or approbation of testaments, refuse not to approve any such testament, being lawfully tendered or offered to them to be proved or approved, so that such testament be exhibited to him or them in writing, with wax thereunto affixed, ready to be sealed, and that the same testament be lawfully proved before the same ordinary (before the sealing) to be true, whole, and the last testament of the same testator, in such form as hath been commonly accustomed in that behalf.”

Sect. 3. “ And when the goods of the testator do amount over and above the clear value of 100s., and do not exceed the sum of 40*l.*, that then they shall not for the probate, insinuation, and approbation of any testament or testaments, or for the registering, sealing, writing, praising, making of inventories, giving of acquittances, fines, or any other thing concerning the same, take or cause to be taken of any person but only 3*s.* 6*d.* and not above; whereof to be to the bishop or ordinary or other person having power to take the probate or approbation of such testament, for him and his ministers 2*s.* 6*d.* and not above; and 12*d.*, residue of the said 3*s.* 6*d.*, to be to the scribe for registering the same. And where the goods of the testator, or person so dying, do amount above the clear value of 40*l.*, that then they shall not take for the probate, insinuation, and approbation of any testament or testaments, or for the registering, sealing, writing, praising, making of inventories, fines, giving of acquittances, or any thing concerning the same probate of a testament, but only 5*s.* and not above;

(*p*) Lind. 181.

Fees for Probate.

whereof to be to the said bishop, ordinary, or other person having power to take the probate of such testament, for him and his ministers 2s. 6d. and not above; and 2s. 6d., residue of the said 5s., to be to the scribe for registering the same; or else the same scribe to be at his liberty to refuse the 2s. 6d., and to have for writing of every ten lines of the same testament, whereof every line to contain ten inches, one penny."

Sect. 4. "And that every such bishop or ordinary, or other person having power to take probate of testaments as aforesaid, their registers, scribes and ministers, shall approve, insinuate, seal and register from time to time the said testament, and deliver the same sealed with the seal of their office to the executor or executors named in any such testaments, for the said sum or sums abovesaid, and in manner and form as is above rehearsed, with convenient speed, without any frustratory delay."

Sect. 5. "And if any person shall require a copy of the said testament so proved, or of the said inventories so made, that then the said ordinary or other persons having authority to take probate of testaments or their ministers, shall from time to time, with convenient speed, without any frustratory delay, deliver or cause to be delivered a true copy or copies of the same, to the said persons so demanding the same, taking for the search and for the making of the copy of either of the said testament or inventory, but only such fee as is before rehearsed for the registering of the said testament; or else the scribe or register to be at his election and liberty to have for every ten lines thereof, being of the proportion before rehearsed, one penny."

Sect. 6. "Provided, that where any person or persons having power to take probate of testaments, have used to take less sums of money than is abovesaid, for the probate of testaments or commissions of administrations, or other cause concerning the same, they shall take and receive the same as before this act they have used to take, and not above."

Sect. 7. "And every bishop, ordinary, archdeacon, chancellor, commissary, official and other person having authority to take probate of testaments, their registers, scribes, praisers, summoners, apparators, and all other their ministers whatsoever they be, that shall do or attempt or cause to be done or attempted against this act in any thing, shall forfeit for every time so offending to the party grieved in that behalf so much money as any such person abovesaid shall take contrary to this present act; and over that shall forfeit 10*l.*, whereof one moiety shall be to the king, and the other moiety to the party grieved that shall sue for the same in any of the king's courts, but that every of them, which shall incur or fall into the danger of such penalty or forfeiture, shall be charged only for

himself, and none of them to be chargeable to that penalty for other's offence." Fees for Probate.

S. 2. *Or for any other manner of cause concerning the same.*]—And it maketh no difference whether the probate be written upon the testament itself, or upon a transcript ingrossed, and in this latter case, if a greater fee be taken by the judge on account of ingrossing, this is within the prohibition of the statute, as was adjudged in the case of *Rouse v. Real*, where the fee taken did amount to 4s. 10d.; and it was said, that if the executor required any to ingross the testament, he may agree with him whom he requireth to do it, as he can, but the judge ought not to exact any fee on that account due to him (*p*).

Upon the whole, Dr. Gibson observes, that it is agreed on all hands, that the fees given by this act are become much too small by the great alteration of the value of money and the prices of things: and therefore now the rule is, the known and established custom of every place being reasonable, which, as he hath been informed (he says), hath been adjudged a good rule (*q*).

By Can. 132, it is ordained, that no judge or register shall in any wise receive for the writing, drawing or sealing of any such *commission*, (as in the said canon before is mentioned), above the sum of 6s. 8d., whereof one moiety to be for the judge, and the other for the register of the court.

And by the statute of the 26 Hen. 8, c. 15, "Forasmuch as divers of the king's subjects inhabited within the archdeaconry of Richmond in the county of York, have been of long time sore and grievously exacted and impoverished by the parsons, vicars and others such as have benefices and spiritual promotions within the same, as by taking of every person when he dieth, in the name of a pension or of a portion, sometime the ninth part of all his goods and sometime the third part, to their open impoverishment; it is enacted, that no manner of spiritual person or others who shall have any manner of benefice or other spiritual promotion within the said archdeaconry, shall in no wise ask, levy, demand or take after the decease of any person, any such portions or pensions, nor any other demand or duty in the name or lieu of the same, on pain of a *præmunire*; but that all the king's subjects of the said archdeaconry, and their executors and administrators, shall be ordered, intreated and used for their goods and chattels after their decease, in like manner as is contained in the statute of the 21 Hen. 8, c. 5, for probate of testaments, and none otherwise; any use, custom, bull, composition, prescription, or ordinance heretofore obtained or used to the contrary notwithstanding."

(*p*) 4 Inst. 336; Gibs. 485.

(*q*) Gibs. 487.

Fees for Pro-
bate.

And by the 31 Geo. 2, c. 10, s. 23, "No ecclesiastical court, or any person whatsoever, under any pretence, shall take more than 1s. for the seal, parchment, writing and suing forth of the probate of any will or any letters of administration, granted to the widow or children, father or mother, brother or sister of any inferior officer, seaman or marine, dying in the pay of his majesty's navy, and for the pains, trouble and expense attending the suing forth of such probate or letters of administration, unless the goods do amount to the value of 20*l.*; nor more than 2*s.* unless the goods do amount to the value of 40*l.*; nor more than 3*s.* unless the goods do amount to the value of 60*l.* And in all cases where it shall be necessary to issue commissions to swear the widows or children, father or mother, brother or sister, being executors or administrators of such inferior officers, seamen or marines, no ecclesiastical court, or any person whatsoever, under any pretence, shall take more than 1s. for the seal, parchment, writing and suing forth of any such commission, and for the pains, trouble and expense attending the same, unless the goods do amount to 20*l.*; nor more than 2*s.* unless the goods do amount to 40*l.*; nor more than 3*s.* unless the goods do amount to 60*l.*; on pain of forfeiting 50*l.* to the party grieved, to be recovered, with full costs, by action of debt, bill, plaint or information, in any of his majesty's courts of record at Westminster, or elsewhere (*r*)."

12. Stamp
Duties.

[By the 55 Geo. 3, c. 184, the stamp duties imposed on probates of wills and letters of administration by 48 Geo. 3, c. 149, are repealed, and the following are substituted in their stead:—

[SCHEDULE, PART THE THIRD.—Containing the duties on probates of wills and letters of administration; on confirmations of testaments, testamentary and dative; on inventories to be exhibited in the Commissary Courts in Scotland; and on legacies out of real or personal, heritable or moveable estate; and on successions to personal or moveable estates upon intestacy.

DUTY.

["PROBATE of a will, and letters of administration, with £ s. d.
a will annexed, to be granted in England (*s*).

["CONFIRMATION of any testament testamentary, or eik thereto, to be expedited in any Commissary Court in Scotland, where the deceased shall have died before or upon the 10th day of October, 1808, and subsequent to the 10th day of October, 1804;

["INVENTORY to be exhibited and recorded in any commissary court in Scotland, of the estate and effects of

(*r*) [See title *Fees*, vol. ii. for the fees of the Court of Arches, &c. and Consistory of London, as regulated by 10 Geo. 4, c. 53.]

(*s*) [*Foster v. Blakelock*, 5 B. & C. 328; S. C. 6 D. & R. 46; *Rogers*

v. James, 2 Marsh. 425; S. C., 7 Taunt. 147; *Doe d. Hanley v. Wood*, 2 B. & A. 724; *Thynne v. Protheroe*, 2 M. & S. 553; *Hunt v. Stevens*, 3 Taunt. 113.—Ed.]

any person deceased, who shall have died after the 10th day of October, 1808, and have left any testament or testamentary disposition of his or her personal or moveable estate and effects, or any part thereof;

[“ Where the estate and effects for or in respect of which such probate, letters of administration, confirmation or eik respectively, shall be granted or expedited, or whereof such inventory shall be exhibited and recorded, exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially, shall be

DUTY.
£ s. d. Fees for Pro-
bate.

Above the value of	20 <i>l.</i> and under the value of	100 <i>l.</i> ...	0	10	0
..	100 <i>l.</i>	200 <i>l.</i> ...	2	0	0
..	200 <i>l.</i>	300 <i>l.</i> ...	5	0	0
..	300 <i>l.</i>	450 <i>l.</i> ...	8	0	0
..	450 <i>l.</i>	600 <i>l.</i> ...	11	0	0
..	600 <i>l.</i>	800 <i>l.</i> ...	15	0	0
..	800 <i>l.</i>	1000 <i>l.</i> ...	22	0	0
..	1000 <i>l.</i>	1500 <i>l.</i> ...	30	0	0
..	1500 <i>l.</i>	2000 <i>l.</i> ...	40	0	0
..	2000 <i>l.</i>	3000 <i>l.</i> ...	50	0	0
..	3000 <i>l.</i>	4000 <i>l.</i> ...	60	0	0
..	4000 <i>l.</i>	5000 <i>l.</i> ...	80	0	0
..	5000 <i>l.</i>	6000 <i>l.</i> ...	100	0	0
..	6000 <i>l.</i>	7000 <i>l.</i> ...	120	0	0
..	7000 <i>l.</i>	8000 <i>l.</i> ...	140	0	0
..	8000 <i>l.</i>	9000 <i>l.</i> ...	160	0	0
..	9000 <i>l.</i>	10,000 <i>l.</i> ...	180	0	0
..	10,000 <i>l.</i>	12,000 <i>l.</i> ...	200	0	0
..	12,000 <i>l.</i>	14,000 <i>l.</i> ...	220	0	0
..	14,000 <i>l.</i>	16,000 <i>l.</i> ...	250	0	0
..	16,000 <i>l.</i>	18,000 <i>l.</i> ...	280	0	0
..	18,000 <i>l.</i>	20,000 <i>l.</i> ...	310	0	0
..	20,000 <i>l.</i>	25,000 <i>l.</i> ...	350	0	0
..	25,000 <i>l.</i>	30,000 <i>l.</i> ...	400	0	0
..	30,000 <i>l.</i>	35,000 <i>l.</i> ...	450	0	0
..	35,000 <i>l.</i>	40,000 <i>l.</i> ...	525	0	0
..	40,000 <i>l.</i>	45,000 <i>l.</i> ...	600	0	0
..	45,000 <i>l.</i>	50,000 <i>l.</i> ...	675	0	0
..	50,000 <i>l.</i>	60,000 <i>l.</i> ...	750	0	0
..	60,000 <i>l.</i>	70,000 <i>l.</i> ...	900	0	0
..	70,000 <i>l.</i>	80,000 <i>l.</i> ...	1050	0	0
..	80,000 <i>l.</i>	90,000 <i>l.</i> ...	1200	0	0
..	90,000 <i>l.</i>	100,000 <i>l.</i> ...	1350	0	0
..	100,000 <i>l.</i>	120,000 <i>l.</i> ...	1500	0	0
..	120,000 <i>l.</i>	140,000 <i>l.</i> ...	1800	0	0
..	140,000 <i>l.</i>	160,000 <i>l.</i> ...	2100	0	0
..	160,000 <i>l.</i>	180,000 <i>l.</i> ...	2400	0	0
..	180,000 <i>l.</i>	200,000 <i>l.</i> ...	2700	0	0
..	200,000 <i>l.</i>	250,000 <i>l.</i> ...	3000	0	0
..	250,000 <i>l.</i>	300,000 <i>l.</i> ...	3750	0	0
..	300,000 <i>l.</i>	350,000 <i>l.</i> ...	4500	0	0
..	350,000 <i>l.</i>	400,000 <i>l.</i> ...	5250	0	0
..	400,000 <i>l.</i>	500,000 <i>l.</i> ...	6000	0	0
..	500,000 <i>l.</i>	600,000 <i>l.</i> ...	7500	0	0
..	600,000 <i>l.</i>	700,000 <i>l.</i> ...	9000	0	0
..	700,000 <i>l.</i>	800,000 <i>l.</i> ...	10,500	0	0
..	800,000 <i>l.</i>	900,000 <i>l.</i> ...	12,000	0	0
..	900,000 <i>l.</i>	1,000,000 <i>l.</i> ...	13,500	0	0
..	1,000,000 <i>l.</i> and upwards	..	15,000	0	0

55 Geo. 3,
c. 184.

- DUTY.
£ s. d.
- [“ LETTERS OF ADMINISTRATION, without a will annexed, to be granted in England ;
- [“ CONFIRMATION of any TESTAMENT dative, to be expedited in any commissary court in Scotland, where the deceased shall have died before or upon the 10th day of October, 1808, and subsequent to the 10th day of October, 1804 ;
- [“ INVENTORY to be exhibited and recorded in any commissary court in Scotland, of the estate and effects of any person deceased, who shall have died after the 10th day of October, 1808, without leaving any testament or testamentary disposition of his or her personal or moveable estate or effects, or any part thereof ;
- [“ Where the estate and effects for or in respect of which such letters of administration or confirmation respectively shall be granted or expedited, or whereof such inventory shall be exhibited and recorded, exclusive of what the deceased shall have been possessed of or entitled to as a trustee (t) for any other person or persons, and not beneficially, shall be

Above the value of		20 <i>l.</i> and under the value of		50 <i>l.</i> ...	0	10	0
..	..	50 <i>l.</i>	..	100 <i>l.</i> ...	1	0	0
..	..	100 <i>l.</i>	..	200 <i>l.</i> ...	3	0	0
..	..	200 <i>l.</i>	..	300 <i>l.</i> ...	8	0	0
..	..	300 <i>l.</i>	..	450 <i>l.</i> ...	11	0	0
..	..	450 <i>l.</i>	..	600 <i>l.</i> ...	15	0	0
..	..	600 <i>l.</i>	..	800 <i>l.</i> ...	22	0	0
..	..	800 <i>l.</i>	..	1000 <i>l.</i> ...	30	0	0
..	..	1000 <i>l.</i>	..	1500 <i>l.</i> ...	45	0	0
..	..	1500 <i>l.</i>	..	2000 <i>l.</i> ...	60	0	0
..	..	2000 <i>l.</i>	..	3000 <i>l.</i> ...	75	0	0
..	..	3000 <i>l.</i>	..	4000 <i>l.</i> ...	90	0	0
..	..	4000 <i>l.</i>	..	5000 <i>l.</i> ...	120	0	0
..	..	5000 <i>l.</i>	..	6000 <i>l.</i> ...	150	0	0
..	..	6000 <i>l.</i>	..	7000 <i>l.</i> ...	180	0	0
..	..	7000 <i>l.</i>	..	8000 <i>l.</i> ...	210	0	0
..	..	8000 <i>l.</i>	..	9000 <i>l.</i> ...	240	0	0
..	..	9000 <i>l.</i>	..	10,000 <i>l.</i> ...	270	0	0
..	..	10,000 <i>l.</i>	..	12,000 <i>l.</i> ...	300	0	0
..	..	12,000 <i>l.</i>	..	14,000 <i>l.</i> ...	330	0	0
..	..	14,000 <i>l.</i>	..	16,000 <i>l.</i> ...	375	0	0
..	..	16,000 <i>l.</i>	..	18,000 <i>l.</i> ...	420	0	0
..	..	18,000 <i>l.</i>	..	20,000 <i>l.</i> ...	465	0	0
..	..	20,000 <i>l.</i>	..	25,000 <i>l.</i> ...	525	0	0
..	..	25,000 <i>l.</i>	..	30,000 <i>l.</i> ...	600	0	0
..	..	30,000 <i>l.</i>	..	35,000 <i>l.</i> ...	675	0	0
..	..	35,000 <i>l.</i>	..	40,000 <i>l.</i> ...	785	0	0
..	..	40,000 <i>l.</i>	..	45,000 <i>l.</i> ...	900	0	0
..	..	45,000 <i>l.</i>	..	50,000 <i>l.</i> ...	1010	0	0
..	..	50,000 <i>l.</i>	..	60,000 <i>l.</i> ...	1125	0	0
..	..	60,000 <i>l.</i>	..	70,000 <i>l.</i> ...	1350	0	0
..	..	70,000 <i>l.</i>	..	80,000 <i>l.</i> ...	1575	0	0
..	..	80,000 <i>l.</i>	..	90,000 <i>l.</i> ...	1800	0	0

(t) [As to what is trust property within this exemption, see the case of *Carr, Administratrix of Walker*, v. *Roberts*, 2 B. & Ad. 905; and see also *post*, the cases of *Attorney-General v. Hope*, 1 C., M. & R. 530; 2 Cl. & Fin. 84; and *Platt v. Routh*, 6 M. & Wels. 756.]

						DUTY.			55 Geo. 3, c. 184.
						£	s.	d.	
Above the value of	90,000 <i>l.</i>	and under the value of	100,000 <i>l.</i> ...			2025	0	0	
..	100,000 <i>l.</i>	..	120,000 <i>l.</i> ...			2250	0	0	
..	120,000 <i>l.</i>	..	140,000 <i>l.</i> ...			2700	0	0	
..	140,000 <i>l.</i>	..	160,000 <i>l.</i> ..			3150	0	0	
..	160,000 <i>l.</i>	..	180,000 <i>l.</i> ...			3600	0	0	
..	180,000 <i>l.</i>	..	200,000 <i>l.</i> ...			4050	0	0	
..	200,000 <i>l.</i>	..	250,000 <i>l.</i> ...			4500	0	0	
..	250,000 <i>l.</i>	..	300,000 <i>l.</i> ...			5625	0	0	
..	300,000 <i>l.</i>	..	350,000 <i>l.</i> ...			6750	0	0	
..	350,000 <i>l.</i>	..	400,000 <i>l.</i> ...			7875	0	0	
..	400,000 <i>l.</i>	..	500,000 <i>l.</i> ...			9000	0	0	
..	500,000 <i>l.</i>	..	600,000 <i>l.</i> ...			11,250	0	0	
..	600,000 <i>l.</i>	..	700,000 <i>l.</i> ...			13,500	0	0	
..	700,000 <i>l.</i>	..	800,000 <i>l.</i> ...			15,750	0	0	
..	800,000 <i>l.</i>	..	900,000 <i>l.</i> ...			18,000	0	0	
..	900,000 <i>l.</i>	..	1,000,000 <i>l.</i> ...			20,250	0	0	
..	1,000,000 <i>l.</i>	and upwards	..	..	..	22,500	0	0	

[“ *Exemptions from all Stamp Duties.*

[“ Probate of wills, letters of administration, confirmation of testament, and eik thereto, and inventory of the effects of any common seaman, marine, or soldier, who shall be slain or die in the service of his majesty, his heirs or successors.

[“ Additional inventory to be exhibited and recorded in any commissary court in Scotland; where the same shall not be liable to a duty of greater amount than the duty already paid upon any former inventory exhibited and recorded of the estate and effects of the same person.

[“ LEGACIES and SUCCESSIONS to personal or moveable estate upon intestacy.

[“ I. Where the testator, testatrix, or intestate died before or upon the 5th day of April, 1805.

[“ For every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards, given by any will or testamentary instrument of any person who died before or upon the 5th day of April, 1805, out of his or her personal or moveable estate, and which shall be paid, delivered, retained, satisfied, or discharged, after the 31st day of August, 1815 :

[“ Also for the clear residue (when devolving to one person) and for every share of the clear residue (when devolving to two or more persons) of the personal or moveable estate of any person who died before or upon the 5th day of April, 1805 (after deducting debts, funeral expenses, legacies, and other charges first payable thereout), whether the title to such residue, or any share thereof, shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy; where such residue, or share of residue, shall be of the amount

55 Geo. 3,
c. 184.

	DUTY. £ s. d.		
or value of 20 <i>l.</i> or upwards, and where the same shall be paid, delivered, retained, satisfied or discharged, after the 31st day of August, 1815.			
[“ Where any such legacy, or residue, or share of such residue, shall have been given, or have devolved, to or for the benefit of a brother or sister of the deceased, or any descendant of a brother or sister of the deceased; a duty at and after the rate of two pounds and ten shillings per centum, on the amount or value thereof	2	10	0
[“ Where any such legacy, or residue, or share of such residue, shall have been given, or have devolved to or for the benefit of a brother or sister of the father or mother of the deceased, or any descendant of a brother or sister of the father or mother of the deceased; a duty at and after the rate of four pounds per centum on the amount or value thereof	4	0	0
[“ Where any such legacy, or residue, or share of such residue, shall have been given, or have devolved to or for the benefit of a brother or sister of a grandfather or grandmother of the deceased, or any descendant of a brother or sister of a grandfather or grandmother of the deceased; a duty at and after the rate of five pounds per centum on the amount or value thereof	5	0	0
[“ And where any such legacy, or residue, or share of such residue, shall have been given, or have devolved to or for the benefit of any person in any other degree of collateral consanguinity to the deceased than is above described, or to or for the benefit of any stranger in blood to the deceased; a duty at and after the rate of eight pounds per centum on the amount or value thereof	8	0	0
[“ II. Where the testator, testatrix, or intestate, shall have died after the 5th day of April, 1805.			
[“ For every legacy, specific or pecuniary, or of any other description, of the amount or value of 20 <i>l.</i> or upwards, given by any will or testamentary instrument, of any person who shall have died after the 5th day of April, 1805, either out of his or her personal or moveable estate, or out of or charged upon his or her real or heritable estate, or out of any monies to arise by the sale, mortgage, or other disposition of his or her real or heritable estate, or any part thereof, and which shall be paid, delivered, retained, satisfied or discharged after the 31st day of August, 1815 :			
[“ Also, for the clear residue (when devolving to one person) and for every share of the clear residue (when devolving to two or more persons) of the personal or moveable estate of any person, who shall			

have died after the 5th day of April, 1805 (after deducting debts, funeral expenses, legacies, and other charges first payable thereout), whether the title to such residue, or any share thereof, shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy; where such residue, or share of residue, shall be of the amount or value of 20*l.* or upwards, and where the same shall be paid, delivered, retained, satisfied or discharged after the 31st day of August, 1815:

DUTY. 55 Geo. 3.
c. 184.
£ s. d.

[“ And also for the clear residue (when given to one person) and for every share of the clear residue (when given to two or more persons) of the monies to arise from the sale, mortgage, or other disposition of any real or heritable estate directed to be sold, mortgaged, or otherwise disposed of, by any will or testamentary instrument of any person who shall have died after the 5th day of April, 1805 (after deducting debts, funeral expenses, legacies, and other charges first made payable thereout, if any) where such residue, or share of residue, shall amount to 20*l.* or upwards, and where the same shall be paid, retained, or discharged after the 31st day of August, 1815:

[“ Where any such legacy or residue, or any share of such residue, shall have been given or have devolved to or for the benefit of a child of the deceased, or any descendant of a child of the deceased, or to or for the benefit of the father or mother, or any lineal ancestor of the deceased; a duty at and after the rate of one pound per centum on the amount or value thereof

Per cent.
1 0 0

[“ Where any such legacy or residue, or any share of such residue, shall have been given or have devolved to or for the benefit of a brother or sister of the deceased, or any descendant of a brother or sister of the deceased; a duty at and after the rate of three pounds per centum on the amount or value thereof

Per cent.
3 0 0

[“ Where any such legacy or residue, or any share of such residue, shall have been given or have devolved to or for the benefit of a brother or sister of the father or mother of the deceased, or any descendant of a brother or sister of the father or mother of the deceased; a duty at and after the rate of five pounds per centum on the amount or value thereof

Per cent.
5 0 0

[“ Where any such legacy or residue, or any share of such residue, shall have been given or have devolved to or for the benefit of a brother or sister of a grandfather or grandmother of the deceased, or any descendant of a brother or sister of a grand-

55 Geo. 3,
c. 184.

- | | |
|--|-----------|
| | DUTY. |
| father or grandmother of the deceased; a duty at | £ s. d. |
| and after the rate of six pounds per centum on the | Per cent. |
| amount or value thereof | 6 0 0 |
- [“ And where any such legacy or residue, or any share of such residue, shall have been given or have devolved to or for the benefit of any person in any other degree of collateral consanguinity to the deceased than is above described, or to or for the benefit of any stranger in blood to the deceased; a duty at and after the rate of ten pounds per centum on the amount or value thereof Per cent. 10 0 0
- [“ And all gifts of annuities or by way of annuity, or of any other partial benefit or interest out of any such estate or effects as aforesaid, shall be deemed legacies within the intent and meaning of this schedule.
- [“ And where any legatee shall take two or more distinct legacies or benefits under any will or testamentary instrument, which shall together be of the amount or value of 20*l.*, each shall be charged with duty, though each or either may be separately under that amount or value (*u*).

[“ *Exemptions* :

- [“ Legacies and residues, or shares of residue, of any such estate or effects as aforesaid, given or devolving to or for the benefit of the husband or wife of the deceased, or to or for the benefit of any of the royal family.
- [“ And all legacies which were exempted from duty by the act passed in the 39th year of his majesty's reign, c. 73, for exempting certain specific legacies given to bodies corporate or other public bodies from the payment of duty.”]

[The same statute enacts by section 38,

Ecclesiastical
Courts not
to grant Pro-
bates or
Letters of
Administra-
tion, without
Affidavit of
Value of Ef-
fects.

[“ That from and after the expiration of three calendar months from the passing of this act, no ecclesiastical court or person shall grant probate of the will or letters of administration of the estate and effects of any person deceased, without first requiring and receiving from the person or persons applying for the probate or letters of administration, or from some other competent person or persons, an affidavit, or solemn affirmation in the case of Quakers, that the estate and effects of the deceased, for or in respect of which the probate or letters of administration is or are to be granted, exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially, but including the leasehold estates for years of the de-

(*u*) [See *Attorney-General v. Sir Charles Cockerell, Bart.*, 1 Price, 165; *Attorney-General v. Lady Louisa Manners and others*, *ibid.* 411; *Attorney-General v. Holford*, *ibid.* 426; *Attorney-General v. Bacchus and Wife*, 9 Price, 30. Affirmed upon writ of error in the Exchequer Chamber, 11 Price, 547; *Att.-Gen. v. Burnie*, 3 Younge & Jerv. 531.—*Ed.*]

ceased, whether absolute or determinable on lives, if any, and without deducting any thing on account of the debts due and owing from the deceased, are under the value of a certain sum to be therein specified, to the best of the deponents' or affirmants' knowledge, information, and belief, in order that the proper and full stamp duty may be paid on such probate or letters of administration; which affidavit or affirmation shall be made before the surrogate or other person who shall administer the usual oath for the due administration of the estate and effects of the deceased."]

Affidavit before whom made.

[Now the 39 & 40 Geo. 3, c. 72, s. 16, enacts,

["And whereas it is expedient that the said commissioners of stamps should be empowered to allow to any person or persons who shall have taken out any probates of any will or letters of administration, through any inadvertence or mistake, in any ecclesiastical court or courts, the full value in other stamped vellum, parchment, or paper, of the amount of the stamp duty on any of such probates or letters of administration that shall have been rendered wholly useless and of no effect whatever, so as that no person or persons shall pay the stamp duty granted upon probates of wills or letters of administration, by any act or acts now in force, more than once upon any one will, or on the same property of any person dying intestate; be it therefore enacted, that where due proof on oath shall be made to such commissioners of stamps, to the satisfaction of the said commissioners, (which oath the said commissioners, or any one of them, is hereby authorized to administer,) that any will hath, through any inadvertence or mistake, been proved, or that any letters of administration have been taken out on the same property, in more than one ecclesiastical or prerogative court, or more than once in any such ecclesiastical court, and that by reason thereof more than one stamp duty shall have been paid thereupon, then and in every such case it shall be lawful for such commissioners, and they are hereby authorized, upon delivery to them of any such useless probate or letters of administration as aforesaid, to be cancelled, and on production of the valid probate or letters of administration that shall have been granted on any such will or property as aforesaid, to cancel such useless probate or letters of administration, and to stamp or mark, or cause to be stamped or marked, or deliver any vellum, parchment, or paper, stamped with stamps of the like denomination and value with the amount of any such probate or probates or letters of administration, without demanding or taking, directly or indirectly for the same, any sum of money or other consideration whatsoever."]

Commissioners of Stamps may cancel useless Probates of Wills and Letters of Administration, and allow such Stamps.

[And the 41 Geo. 3, c. 86, s. 3, enacts,

["That it shall be lawful for the said commissioners of stamps, and they are hereby authorized and required to provide a stamp or mark distinguishable from all other stamps or marks used in relation to any stamp duties, for the purpose of stamping or marking any piece of vellum, parchment, or paper, whereon any probate of any will or letters of administration shall be ingrossed, printed, or written, in relation to any estate in respect whereof any probate or letters of administration shall have been before taken out, and the full amount of the duties payable thereon, by any act

To prevent the double Payment of Duties, the Stamp Office shall provide a Stamp for marking Probates of Wills or Letters of Administration, relating to any Estate in respect

whereof any Probates, &c. shall have been before taken out, and the Duties then payable discharged.

or acts of parliament then in force, according to the full value of such estate, shall have been duly paid and discharged; and in every case where any probate or probates, or letters of administration, shall have been taken out, duly stamped according to the full value of the estate in respect whereof the same shall have been granted, then, and in such case, any further or other probate or letters of administration as aforesaid, which shall be at any time thereafter applied for or in respect of such estate, shall and may be issued and granted upon any piece of vellum, parchment, or paper, stamped, or marked with the stamp or mark provided by the said commissioners by virtue of this act, for such other probates or letters of administration as aforesaid; and every such other probate or letters of administration which shall be duly stamped or marked with such stamp or mark as last aforesaid, shall be as available in the law, and of the like force and effect in all respects whatever, as if the vellum, parchment, or paper whereon the same shall be ingrossed, printed, or written, had been duly stamped with the stamp or mark, denoting the full amount of the duties payable in respect of the probate or letters of administration taken out on the full value of such estate; anything in any act or acts, or this act, before contained, to the contrary thereof in anywise notwithstanding."

[And the 48 Geo. 3, c. 149, otherwise repealed, as we have seen above, enacts,

Probates of Wills and Letters of Administration valid as to Trust Property, although the value thereof be not covered by the Stamp Duty.

[Sect. 35. "That from and after the passing of this act, the probate of the will of any person deceased, or the letters of administration of the effects of any person deceased, heretofore granted, or to be hereafter granted, either before or upon or after the tenth day of October one thousand eight hundred and eight, shall be deemed and taken to be valid, and available by the executors or administrators of the deceased, for recovering, transferring or assigning any debt or debts, or other personal estate or effects, whereof or whereto the deceased was possessed or entitled, either wholly or partially, as a trustee, notwithstanding the amount or value of such debt or debts, or other personal estate or effects, or the amount or value of so much thereof, or such interest therein, as was trust property in the deceased (as the case may be) shall not be included in the amount or value of the estate, in respect of which the stamp duty was paid on such probate or letters of administration."

Where Executors, &c. allege that any property was vested in the deceased, as a Trustee, a special affidavit thereof may be required in the several Instances specified.

[Sect. 36. "That where the executors or administrators of any person deceased shall be desirous of transferring or of receiving the dividends of any share, standing in the name of the deceased, of and in any of the Government or Parliamentary stocks or funds transferable at the Bank of England, or of and in the stock and funds of the Governor and Company of the Bank of England, or of and in the stock and funds of any other company, corporation, or society whatsoever, passing by transfer in the books of such company, corporation, or society, under and by virtue of any such probate or letters of administration as aforesaid, and shall allege that the deceased was possessed thereof or entitled thereto, either wholly or partially, as a trustee, it shall be lawful for the said

Governor and Company of the Bank of England, and for any such other company, corporation, or society as aforesaid, or their respective officers, for their indemnity and protection, to require such affidavit or affirmation of the fact as hereinafter is mentioned, if the fact shall not otherwise satisfactorily appear; and thereupon to permit such executors or administrators to transfer the stock or fund in question, or receive the dividends thereof, without regard to the amount of the stamp duty on the probate of the will of the deceased, or the letters of administration of his or her effects: And where the executors or administrators of any person deceased shall have occasion to recover any debt or debts, or other personal effects, due or apparently belonging to the deceased, and shall allege that the deceased was possessed thereof or entitled thereto, either wholly or partially, as a trustee, it shall be lawful for the person or persons, liable to pay or deliver such debt or debts or other effects, to require such affidavit or affirmation of the fact as hereinafter is mentioned, if the fact shall not otherwise satisfactorily appear; and thereupon to pay, deliver, or make over the debt or debts, or other effects in question, to such executors or administrators, or as they shall direct, without regard to the amount of the stamp duty on the probate of the will of the deceased, or the letters of administration of his or her effects: And where the executors or administrators of any person deceased shall have occasion to assign or transfer any debt or debts due to the deceased, or any chattels real, or other personal effects, whereof or whereto the deceased was possessed or entitled, and shall allege that the same respectively was or were due to or vested in the deceased, either wholly or partially, as a trustee, it shall be lawful for the person or persons, to whom or for whose use such debt or debts, chattels real, or other personal effects, shall be proposed to be assigned or transferred, to require such affidavit or affirmation of the fact as hereinafter is mentioned, if the fact shall not otherwise satisfactorily appear; and thereupon to accept the proposed assignment or transfer, without regard to the amount of the stamp duty on the probate of the will of the deceased, or the letters of administration of his or her effects."

[Sect. 37. "That upon any such requisition as aforesaid, the executor or executors, administrator or administrators, of the deceased, or some other person or persons, to whom the facts shall be known, shall make a special affidavit or affirmation of the facts and circumstances of the case, stating the property in question, and that the deceased had not any beneficial interest whatever in the same, or no other beneficial interest therein than shall be particularly mentioned and set forth (as the case may be), but was possessed thereof or entitled thereto, either wholly or in part (as the case may be) in trust for some other person or persons, whose name or names, or other sufficient description, shall be specified in such affidavit or affirmation, or for such purposes as shall be specified therein; and that the beneficial interest of the deceased, if any, in the property in question, doth not exceed a certain value to be therein also specified, according to the best estimate that can be made thereof, if reversionary or contingent, and that the amount or value of the estate, for which the stamp duty was paid on the probate of the will of the deceased, or on the letters of administration

Particulars to be stated in such Affidavits by Executors, &c. respecting Trust Property.

of his or her effects, is sufficient to include and cover such beneficial interest of the deceased, as well as the rest of the personal estate whereof or whereto the deceased was beneficially possessed or entitled, and for which such probate or letters of administration shall have been granted, as far as the same have come to the knowledge of such executor or executors, administrator or administrators; and where the affidavit or affirmation of the facts and circumstances of the trusts shall be made by any other person than the executor or executors, administrator or administrators of the deceased, such executor or executors, administrator or administrators, shall make affidavit or affirmation, that the same are true to the best of his, her, or their knowledge, and that the property in question is intended to be applied and disposed of accordingly; which affidavits or affirmations shall be sworn or made before a master in chancery, ordinary or extraordinary, (who is hereby authorized to take the same, and administer the proper oath or affirmation for that purpose,) and shall be delivered to the party or parties requiring the same, and shall be sufficient to indemnify and protect the party or parties acting upon the faith thereof; and if any person or persons, making any such affidavit or affirmation as aforesaid, shall knowingly and wilfully make a false oath or affirmation of or concerning any of the matters to be therein specified and set forth, every person so offending, and being thereof lawfully convicted, shall be subject and liable to such pains and penalties as by any law now in force persons convicted of wilful and corrupt perjury are subject and liable to."

Penalty of Perjury for false Oath.

[An exception is made in favour of Savings Banks by 9 Geo. 4, c. 92, to the following effect.

Depositor dying leaving any Sum exceeding 50*l*. the same not to be paid until after Administration.

No Duty to be paid on Probate where the Estate is under 50*l*.

Certificate of Amount and Value of Depositor's Interest to be produced on claiming Probate, &c.

[Sect. 40. "That in case any depositor in the funds of any institution taking the benefit of this act shall die, leaving any sum or sums of money in the said funds, or any dividends or interest due thereon, belonging to him or her at the time of his or her death, exceeding in the whole the sum of fifty pounds, the same shall not be paid to any person or persons as representative or representatives of such depositor, but upon the probate of the will of the deceased depositor, or letters of administration of his or her estate and effects: Provided always, that where the whole estate or effects of any such deceased depositor, for or in respect of which any probate or letters of administration respectively shall be granted, shall not exceed the value of fifty pounds, no stamp duty shall be chargeable thereon, nor upon any legacy or residue or part thereof bequeathed, nor upon any share or part of the estate or effects to be paid or distributed by or under such probate or letters of administration: Provided also, that in every such case the person or persons claiming such probate or letters of administration free from stamp duty under this act, shall exhibit to the court or person having authority to grant the probate or letters of administration in such case, a certificate of the amount and value of the share and interest which the deceased depositor had in the funds of the said institution, which certificate shall be granted in such form and manner as shall have been settled by the rules or regulations of the institutions respectively, and shall be signed or testified by such person or persons as

shall be directed therein; and every such certificate shall be taken and received, by the court or person having authority to grant such probate or letters of administration, as evidence of the amount and value of the shares and interests of the deceased depositor in the funds of the said institution."

[It is the duty of the executor or administrator to take out the grant to the extent of the sum which he expects to receive(*x*), but he need not include in his calculations debts which he *bonâ fide* believes to be doubtful or bad(*y*); and if there be personalty in York and Canterbury, he need only pay the duty upon the property in the province in which he takes out probate: so that when he took out probate in the province of York, he would only pay duty for personalty in that province, paying the probate duty in Canterbury for the personalty in that province(*z*).

[It seems to be now settled law, *that the probate is granted only in respect of that property which, but for the will, the ordinary would be entitled to administer.* This maxim furnishes the test since the decision of the House of Lords in *The Attorney-General v. Hope* (*a*), by which the liability of property to probate duty is to be determined. And the barons of the Court of Exchequer relied upon it in the recent case of *Platt v. Routh*, in which they decided that the power of appointment exercised by a daughter in the disposal of the residuary estate of her father, though as far as regarded the *legacy* duty it was an absolute and general power, was not liable to probate duty (*b*).

[The following is the form of the certificate delivered to the executor in the Prerogative Court of Canterbury:—

[*Form of Probate.*

[*William by Divine Providence, Archbishop of Canterbury, Primate of all England, and Metropolitan, do by these presents make known to all men, that on the — day of —, A. D. —, at London, before the Worshipful J. D., Doctor of Laws, Surrogate of the Right Hon. Sir J. N., Knight, also Doctor of Laws, Master Keeper and Commissary of our Prerogative Court of Canterbury lawfully constituted, the last will and testament of A. B., late of —, deceased, hereunto annexed, was proved, approved, and registered; the said deceased having whilst living, and at the time of his death, goods, chattels or credits in divers dioceses and jurisdictions, by reason whereof the proving and registering the said will, and the granting administration of all and singular the said goods, chattels and credits, and also the auditing, allowing, and final discharging the account thereof, are well known to appertain only and wholly to*

- | | |
|--|---|
| (<i>x</i>) [Butler v. Butler, 2 Phill. 39.] | Chancellor in <i>Palmer v. Whitmore</i> , 5 |
| (<i>y</i>) [Moses v. Crafter, 4 C. & P. 524, per Lord Tenterden.] | Sim. 178; and of the Exchequer, in <i>Attorney-General v. Staff</i> , 2 Crompt. & Mee. 124. See also the cases of |
| (<i>z</i>) [<i>In re Ewin</i> , 1 Cr. & J. 153.] | <i>Nail v. Punter</i> , 5 Sim. 563; and |
| (<i>a</i>) [2 Cl. & Fin. 84; 8 Bligh, 44.] | <i>Vandiest v. Fynmore</i> , 6 Sim. 570. |
| (<i>b</i>) [<i>Platt v. Routh</i> , 6 Meeson & Welsby, 756, seems to have overturned the decisions of the Vice- | And see Hulme's edition of Chitty's Statutes.—ED.] |

us and not to any inferior judge ; and that the administration of all and singular the goods, chattels and credits of the said deceased, and anyway concerning his will, was granted to C. D., the sole executor named in the said will, he having been already sworn well and faithfully to administer the same, and to make a true and perfect inventory of all and singular the said goods, chattels and credits, and to exhibit the same into the registry of our said court on or before the — day of — next ensuing, and also to render a just and true account thereof.

Given at the time and place above written, and in the — year of our translation.

Sworn under £——, and that the }
testator died — day of —, }
A. D. —.

[As to the rules which regulate what is termed the *common form* business, and the reasons for the establishment of those rules, the reader should consult the whole judgment of Sir J. Nicholl, *In the goods of Elizabeth Darling* (c), from which the following extract is taken, as showing why the time of the death is inserted in the certificate given above.

[“ On the principle of combining facility with security, the court has made some regulations. For example, the time of the death is required to form part of the oath, and to be inserted in the margin of the probate or administration. The reason for this is, that if the time of the death has long past, it becomes reasonable that some inquiry should be made why the grant was not sooner taken out ; the delay raises something of a suspicion requiring explanation. By noting the time of the death on the margin, debtors to the estate, whether public bodies, as the bank, or private individuals, have their attention directly drawn to it, and are enabled more easily to ascertain that payment is made to the right person. This regulation produces little or no inconvenience, and has given great satisfaction ; the effect of it having, as represented to me, been found by the Bank of England and South Sea House to be extremely beneficial. The court has also publicly mentioned, and desired it to be understood in the registry and in the profession, that it looks for precaution both to the practitioners and to the public office.

[“ On application to any proctor to extract a grant, it is his duty, if there be any matter requiring explanation, to obtain that explanation of the party, in order to satisfy his own conscience and the inquiries of the public officer,—why, for instance, if there has been a considerable lapse of time, the grant was not earlier applied for. It is the duty of the clerk of the seat, before he forwards the business, to require that explanation of the proctor, in order that he may be enabled to state it to the registrar. It is the duty of the registrar, when the grant comes before him for signature, if he sees any thing

requiring explanation, to refer to the clerk of the seat, and to ascertain whether the difficulty has been removed: and thus by the inquiry of the proctor (if necessary) to satisfy himself that the grant may properly issue. If the explanation be not satisfactory to the registrar, he is either to stop the business on his own discretion, or to apply to the judge for his directions."—ED.]

2. Of the Administration of Intestate's Effects.

1. Power of the Ordinary	353	10. Administration pendente Lite	381
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[The jurisdiction which the ecclesiastical court exercises over the effects of persons dying without a will rests on a very ancient foundation: in the early periods of our history the ordinary had by common law the absolute disposal of the personal property of all intestates; and, under the pretext of applying their goods to religious purposes (*in pios usus*), possessed itself of them not only in cases where the deceased left a widow and children, or other near relations, but in defiance also of the just claims of creditors. On this footing the law continued under the Norman kings and the first sovereigns of the line of Plantagenet; but when the free spirit of our constitution, which had been long labouring under the pressure of the feudal institutions and the shackles of Papal superstition, commenced those struggles which ultimately led to its emancipation, the abuses practised by the ordinary in the administration of the effects of intestates became in their turn subjected to correction and control.

[The 32nd Article of the Magna Charta extorted from King John expressly provides against them; but it is a curious fact, and one which strongly marks the influence of the Papal power in England at that period, that this article was wholly omitted in the Magna Charta of Henry III.

[The 13 Edw. 1, st. 1, c. 19, (commonly called the Statute of Westminster,) made the estates of intestates liable to the payment of their just debts.

[The 31 Edw. 3, st. 1, c. 11, compelled the ordinary to depute the next and most lawful friends of the deceased to administer his goods.

Power of the
Ordinary.

[The 21 Hen. 8, c. 5, placed the law on the footing on which it now stands (*d*).—ED.]

This matter concerning the administration of intestates' effects, so far as the same hath respect unto peculiar jurisdictions, *bona notabilia*, process in the king's name, the oath in *animam constituentis*, administration by commission, and the fees of administration of seamen's effects, hath been treated of already in the law concerning the probate of wills.

As to the disposition of intestates' effects, and granting administration, it is plain that, by the common law, and before the statute of the 13 Edw. 1, st. 1, c. 19, here following, the ordinary had the absolute disposal of intestate's effects (*e*).

But Lord Coke thinks that this was granted to him by some particular constitutions; and therefore says, that anciently the kings of England, by their proper officers, were wont to take goods of intestates in their hands (*f*).

And there are several instances, in Madox's History of the Exchequer, where the king issued a mandate to his officers to attach the goods of divers persons who died intestate (*g*).

But this seemeth to have been only in case where they were indebted to the king, who by the law was to be satisfied before the other creditors, according to the statute of Magna Charta, c. 18, which enacteth as follows: "If any that holdeth of us lay fee do die, and our sheriff or bailiff do shew our letters patents of our summons for debt, which the dead man did owe to us; it shall be lawful to our sheriff or bailiff to attach and inroll all the goods and chattels of the dead, being found in the said fee, to the value of the same debt, by the sight and testimony of lawful men, so that nothing thereof shall be taken away, until we be clearly paid of the debt."

But so much as remained over and above the king's debt, or if nothing was owing to the king, then the whole was in the sole power of the ordinary to dispose. And therefore if a man died intestate, neither his wife, child, nor next of kin, had any right to a share of his estate, but the ordinary was to distribute it according to his conscience to pious uses; and sometimes the wife and children might be amongst the number of those whom he appointed to receive it; but however, the law trusted him with the sole disposition (*h*).

The first statute that abridged the power of the ordinary herein was the afore-mentioned statute of the 13 Edw. 1, st. 1, c. 19, by which it is enacted as followeth: "Whereas after the death of a person dying intestate, which is bounden to some other for debt, the goods come to the ordinary to be disposed, the ordinary from henceforth shall be bound to answer the debts as far forth as the goods of the dead will extend, in such

How far
abridged by
13 Edw. 1,
st. 1, c. 19.

(*d*) [Note by Dr. Phillimore to p. 124, vol. i. of his Reports.]

(*e*) 2 Bac. Abr. 398.

(*f*) *Henslow's case*, 9 Co. 36.

(*g*) Mad. Exch. 237.

(*h*) 2 Bac. Abr. 398.

sort as the executors of the same party should have been bounden if he had made a testament.” Power of the Ordinary.

Dying Intestate.]—There be divers kinds of intestates; one, that maketh no all at will; another, that maketh a will and executors, and they refuse, in this case he dieth *quasi intestatus*, and these are within the purview of this act. Therefore the ordinary is the person whom the law appointeth to have the charge or administration of the goods and chattels of the party that dieth intestate, or *quasi intestatus*. And justly did the law in this case appoint the ordinary; for the law presumed, that he who had the care of his soul in his lifetime, would after his death have care of his temporal goods and chattels, to see them well disposed and administered (*i*).

Which is bounden to some other for Debt.]—This is not only intended of an obligation or deed in writing, but howsoever he was charged in law, as for rent upon a lease, or upon an assumpsit, or the like (*k*).

For Debt.]—This act is not only intended of that which is properly a debt, but of all duties, covenants, or just causes of action, such as might be brought against executors (*l*).

The Goods come to the Ordinary to be disposed.]—So that this statute doth not give this power of disposing, but supposeth it in the ordinary; the statute being, as to this, in affirmance only of the common law (*m*).

But unless some of the goods or chattels came to the hands and possession of the ordinary, he was not to be charged by the common law; but if they came to his hands, and he should neither administer and pay the debts and duties himself, nor commit them over to the kin and friends of the intestate that would, the common law did charge him, and so doth this act which is made in affirmance of it (*n*).

Goods come to the Ordinary.]—If a man die intestate, and a stranger taketh the goods, the ordinary shall not have an action of trespass for taking of them unless he had taken them into his possession. But the executor or administrator before seizure may have an action of trespass (*o*).

Come to the Ordinary.]—Neither can the ordinary have any action of debt, covenant, or any other action which belonged to the intestate; but those to whom the ordinary committeth administration may have all these actions by the statute of the 31 Edw. 3, hereafter following; but before that statute, there was no remedy by law given to the administrators to recover those things in action (*p*).

But by the common law, an action of debt did lie against the administrators, but it was by the name of executors until the said statute of the 31 Edw. 3 (*q*).

(*i*) 2 Inst. 397.

(*k*) Ibid.

(*l*) Ibid.

(*m*) 5 Co. 83.

(*n*) 2 Inst. 397.

(*o*) Ibid.

(*p*) 2 Inst. 397, 398.

(*q*) 2 Inst. 398.

Power of the
Ordinary.

To the Ordinary.—If the ordinary take goods of the intestate, being out of his diocese, he shall not be charged as ordinary by this act; because he taketh them of his own wrong, and not as ordinary, in which right he is to be charged by this act (*r*).

Ordinary.—That is, not only the bishop, but every one that is in stead of the bishop, in this matter of taking care and cognizance of the goods of intestates, as archdeacon, chancellor, commissary, official, and those who have peculiar jurisdiction. Some of whom having, from time to time, accidentally omitted their title or style of jurisdiction in the letters of administration by them granted, have occasioned various contests in the courts of common law, concerning the validity of administrations executed in virtue of such letters, as the judgments upon the validity or invalidity of them have been also various. The enumeration of which is not material; since there is one safe, short and plain rule (viz. the inserting in all such letters the style of jurisdiction as well as the name of the ordinary) which, being observed, is a security for ever against all such contests (*s*).

And not only an ordinary or guardian of the spiritualities or others that be in the place of the ordinary of right, are within this act; but also such as usurp the place, and are in possession by wrong, are to be charged by this act (*t*).

To be disposed.—If it be demanded what interest the ordinary hath in the goods of the person intestate which come to his hands, it is answered, that he hath such an interest as the administrator to whom administration is committed during the minority of an executor, to the behoof and profit of the executor, and not otherwise, nor in other manner. So as the ordinary may administer for the good of the intestate, but cannot give the goods of the intestate, or do any thing to his prejudice (*u*).

The Ordinary from henceforth shall be bound.—If goods of the intestate come to the hands of the ordinary, and he dieth, although the words be that *the ordinary shall be bound*, yet his executors or administrators shall be charged in an action of debt, for when this act bindeth the ordinary, by consequence his executors or administrators are bound. But if the ordinary commit administration to one, and he taketh the goods into his possession and dieth, no action lieth against his executors (*x*).

If the ordinary take goods into his hands of the intestate, and after commit administration, and the ordinary retaineth the goods, he shall be charged, notwithstanding the committing of administration (*y*).

(*r*) 2 Inst. 398.

(*s*) Gibs. 478.

(*t*) 2 Inst. 398.

(*u*) Ibid.

(*x*) Ibid.

(*y*) Ibid.

Shall be bound to answer.—At the common law the ordinary might have had trespass for goods taken out of his possession, but no action did lie against the ordinary; but now, by this statute, an action lies against him, but he cannot have action by this statute (z). Power of the Ordinary.

If administration is denied by the ordinary to the person who is entitled to it, a mandamus will go from the temporal courts to grant it, except a controversy is depending, whether there is a will or not; for then (as Holt, Chief Justice, said) suppose the will should prove good, what will the granting of administration signify? (a) 2. Ordinary may be compelled by Mandamus.

H., 3 Geo. 2, *The King v. Bettesworth* (b). In the case of a will, a mandamus was granted to Dr. Bettesworth, as judge of the Prerogative Court of Canterbury, to grant probate of the Earl of Londonderry's will, to the executors therein named. The doctor returned, that it was the custom and practice of the Prerogative Court, that if any creditor of the deceased enters a caveat against granting probate, and swears himself to be a creditor, there goes out a commission of appraisement till the return whereof the judge hath not used nor ought to grant any probate; then he sets out, that two creditors, who swore to their debts, entered a caveat, and prayed a commission of appraisement, which was decreed and issued, but is not yet returnable, and for that cause he cannot as yet grant a probate. Upon argument, the court held the return to be ill, for that the judge can only stay the probate where there is a contest about the validity of the will. This commission of appraisement can be of no use but to spend money, and delay the executor from getting in the effects of the testator. And by the 21 Hen. 8, c. 5, the probate is to be granted *with convenient speed without any frustratory delay*, and the ecclesiastical court shall never be suffered to set up their practice against the law of the land. And a peremptory mandamus was granted. What is not a good Return to a Mandamus.

H., 4 Geo. 2, *Smith's case* (c). It was moved for a mandamus to Dr. Bettesworth, commanding him to grant administration to Smith of the goods of his deceased son, during the minority of his grandson. Against this it was insisted that a father hath not an equal right with the son, and that the spiritual court hath always considered these administrators only as trustees for the infant, and have never kept to any rule in granting them, but according to the circumstances of the family; where there are several in equal degree, as children, they have always chosen which they pleased. And by the court. When we grant a mandamus, it is to oblige the judge to do right to the party who sues the writ; but as there is no law What is a good Return to a Mandamus.

(z) 1 Rolle's Abr. 906.

(a) Gibs. 478.

(b) Str. 857.

(c) Str. 892, *vide infra*.

Ordinary may
be compelled
by Manda-
mus.

The King
v.
Bettesworth.

which says to whom these administrations during minority shall be granted, there is no law to be put in execution. In the case of the next of kin, he is entitled *de jure*, and therefore in this case we grant a mandamus of course. We will grant no mandamus in this case.

M., 7 Geo. 2, *The King v. Bettesworth*(d). John Kynaston, esquire, made his will, and two persons executors, and left the residue of his personal estate to his youngest son Edward. The executors renounced, and the residuary legatee moved for a mandamus to be admitted to prove the will, and have administration with the will annexed. And a rule was made to show cause. On showing cause, it was insisted, that this case differed from Lord Londonderry's, where the commission of appraisement was set up, against the immediate grant of the probate, which the statute of the 21 Hen. 8, c. 5, requires shall be without any frustratory delay, and the ordinary hath no election there; whereas, in the present case, he is not bound to grant the administration to the residuary legatee, none of the statutes mentioning him; on the contrary, the statute of the 21 Hen. 8, c. 5, which takes notice of the renunciation of executors, leaves the matter to the election of the ordinary. And of this opinion was the court, who said, if the commission of appraisement was a grievance, it would be proper matter of appeal, but they could not break into the practice of the court below. And Lord Hardwicke mentioned a case in Chancery before Lord Mansfield, between *Wheeler* and *The Archbishop of Canterbury*, where it was held, that these sort of administrations are not within the statute of distribution, which brings it to *Smith's case*, where a mandamus to grant administration during the minority of an executor to the father of the executor, was refused, because there was no law obliging the spiritual court so to do. And the rule for a mandamus was discharged.

[Where a *widow* applied for a mandamus to commit administration to her, it was refused in that form because the ordinary might choose between her and the next of kin, but the writ issued generally to grant administration of the goods of the intestate (e).

[Generally, it is a good return to a mandamus, that it is disputed in the court of probate whether there is a will or not (f).—ED.]

31 Edw. 3,
st. 1, c. 11.

3. To be
granted to
the Widow
or next of
Kin.

By the statute of the 31 Edw. 3, st. 1, c. 11, "In case where a man dieth intestate, the ordinary shall depute the next and most lawful friends of the deceased, to administer his goods."

(d) Str. 956.

(e) [*Anon.* 1 Str. 552; *King v. The Inhabitants of Horsley*, 8 East, 408.]

(f) [*Anon.*, 5 Mod. 375; *Rex v. Dr. Hay*, 1 W. Black. 640.]

The Ordinary shall depute.]—Before this statute the ordinary was not *compellable* to grant administration; but now by this act he is commanded, and thereby compellable to grant administration; and a refusal to do it, is a contempt to the king, and an injury to the party (g).

To be granted
to the Widow
or next of
Kin.

To the next and most lawful Friends.]—Before this act, the ordinaries might have granted administration to whom they pleased; but hereby they are restrained, to the next and most lawful friends (h).

Most lawful Friends.]—That is, to the next of blood, who are not attainted of treason, felony, or have other lawful disability (i).

As, by the 9 & 10 Will. 3, c. 32, persons denying the Trinity, or asserting that there are more Gods than one, or denying the Christian religion to be true, or the Holy Scriptures to be of divine authority, shall for the second offence be disabled to be administrators.

[By 53 Geo. 3, c. 160, s. 2, so much of the foregoing statute as relates to persons denying as therein mentioned the Trinity, is repealed.—ED.]

And by the several acts for qualifying for offices, persons executing their offices not being qualified, after the time limited for their qualification shall be expired, shall be disabled to be administrators.

If a *bastard* dies intestate, without wife or issue, leaving a personal estate, in such case the king shall be entitled, and the ordinary shall grant administration to the king's patentee (k).

And by the statute of the 21 Hen. 8, c. 5, s. 3, 4, "In case any person die intestate, or the executors named in any testament refuse to prove the said testament, then the ordinary or other person having authority to take probate of testaments, shall grant the administration of the goods of the testator, or person deceased, to the widow of the same person deceased, or to the next of kin, or to both, as by the discretion of the same ordinary shall be thought good. And in case where divers persons claim the administration as next of kin, which be equal in degree of kindred to the testator or person deceased: and where any person only desireth the administration as next of kin, where indeed divers persons be in equality of kindred; in every such case the ordinary to be at his election and liberty, to accept any one or more making request, where divers do require the administration: or where but one, or more of them, and not all being in equality of degree, do make request, then the ordinary to admit the widow, and him or them only making request, or any one of them, at his pleasure.

21 Hen. 8,
c. 5.

[It has been said that] the construction of this statute, upon

(g) 9 Co. 40.
(h) Ibid.

(i) 9 Co. 40.
(k) 3 P. Will. 33.

To be granted
to the Widow
or next of
Kin.

To the Father
or Mother, of
their Chil-
dren's Effects.
To the Grand-
mother before
Uncles and
Aunts.

To the Son
before the
Father.

Half-blood.

In general, to
the next of
Kindred.

Residuary
Legatee.

the proximity of degrees, must be according to common law (*l*); [but modern cases seem to have fully established, that it shall be construed according to the civil law (*m*).—ED.]

Administration may be granted of the goods of a son or daughter to the father or mother as next of blood (*n*).

If one dies intestate, leaving a grandmother and uncles and aunts, the grandmother is entitled to the administration in exclusion of the uncles and aunts (*o*).

If there be grandfather, father, and son, and the father dies intestate, the son shall have the administration and not the grandfather (*p*).

Administration must be granted to the brother of the half-blood before the uncle, for he has the immediate blood of the father, which the uncle hath not (*q*).

And the half-blood in this respect is esteemed as near as the whole. But if there is a brother and a sister of the half-blood, and the sister is married, then it must be granted to the brother, and not to her and her husband, because in effect it makes the husband administrator, who is not of kin to the intestate, and if she die, the husband would still continue administrator, and so might possess himself of the whole personal estate (*r*).

Generally, by the statute aforesaid, administration shall be granted to the wife or *next of kindred*, and who these *next of kindred* are, will fall in more properly under the head concerning *Distribution* (*s*).

There is one exception to the rule about the next of kin furnished by cases where the executor refuseth, or accepting dies intestate, and that is, with respect to the residuary legatee (*t*), who, being entitled to what remains after debts and legacies paid, hath the first and best title to be administrator of the estate, as was agreed in the case of *Thomas v. Butler*. For this taketh away the presumption of the statute that the testator would have given it to the next of kin (*u*).

(*l*) [*Blackbrough v. Davis*, 12 Mod. 616; S. C. 1 P. Wms. 50.]

(*m*) [*Vide infra*, "Distribution."]

(*n*) Law of Test. 466.

(*o*) Prec. Cha. 527.

(*p*) 2 Vern. 125.

(*q*) 1 Ventr. 425.

(*r*) [*Sir George Sands' case*, 3 Salk. 21.]

(*s*) [*Vide infra*, "Distribution."]

(*t*) [Because he is bound, for his own sake, to be careful in collecting the effects and improving the estate, *Repington v. Holland and Repington*, 2 Lee, 254; *West and Smith v. Wilby*, 3 Phill. 381; *Friswell v. Moore*, 3 Phill. 140, where they gave justifying

security; *Wetdrill v. Wright and others*, 2 Phill. 243; the residuary legatee is said to be the testator's choice, *Atkinson v. Barnard*, 2 Phill. 318; even where there is no prospect of a residue, *ibid.*, and *Thomas v. Butler*, 1 Ventr. 219. *Quære*, as to whether when residuary legatee in trust; *Hutchinson v. Lambert*, 3 Add. 27; cf. with *Cousmaker v. Chamberlayne*, 2 Lee, 243; *Boddicott v. Dalseel*, *ibid.* 294; *Fawkener v. Jordan*, *ibid.* 327; *Cresswell v. Cresswell*, 2 Add. 347, as to substituted trustees.]

(*u*) Gibs. 479; *Thomas v. Butler*, 1 Ventr. 217.

[It will be seen below that the residuary legatee, as well as every person possessing a prior right, must be cited before the grant be made to any other person (*p*).—ED.]

To be granted to the Widow or next of Kin.

The statute (21 Hen. 8) says, *To the Widow of the same Person deceased, or to the next of his Kin.*—T., 9 Geo. 1. It was moved for a mandamus to the official of the Bishop of Gloucester to commit administration to the widow of an intestate. But by the court: That will be to deprive the ordinary of his election, in granting it to her, or the next of kin; therefore, take your mandamus generally, to grant administration of the goods of the intestate (*q*).

Or both.—And this, either jointly or separately: for the ordinary may grant several administrations of several parts of the goods of the intestate (*r*).

Thus in the case of *Fawtry v. Fawtry*, H., 3 Will. 3 (*s*), a man died intestate, leaving a wife and a brother. The ordinary had granted the administration of some particular debts to the brother, and of the residue to the wife. And a mandamus was moved for to grant administration to the wife. But by the court: The ordinary may grant administration to the brother as to part, and to the wife for the rest; in which case neither can complain; since the ordinary need not have granted any part of the administration to the party complaining. But if the intestate leave a bond of 100*l.*, the ordinary cannot grant administration of 50*l.* to one person and 50*l.* to another, because this is an entire thing.

[But the court of probate always prefers, *cæteris paribus*, a sole to a joint administration (*t*). And in modern practice the wife is preferred under ordinary circumstances (*u*). And the court has refused, after decreeing administration to a widow under one *caveat*, to allow it to be stopped from passing the seal by another *caveat* (*x*). Nevertheless, the grant is discretionary, and upon *good cause* the next of kin are preferred (*y*). And such cases as the following have been deemed *good causes*. The elopement of a wife from her husband, and cohabitation with another person, whom at his death she married (*z*); so lunacy of the widow; but there the court required an inventory and justifying securities (*a*). And her

Court prefers a sole Administration.

What are good Excuses for excluding the Widow.

(*p*) [See 6, "Creditor."]

(*q*) Str. 552.

(*r*) 1 Rolle's Abr. 908.

(*s*) 1 Salk. 36.

(*t*) [*Legatt v. Legatt*, 1 Lee, 348; *Warwick v. Greville*, 1 Phill. 126; *Bell v. Timiswood*, 2 Phill. 22; *Dampier v. Colson*, 2 Phill. 54.]

(*u*) [*Webb v. Needham*, 1 Add. 495; *Hughes v. Cook*, 1 Lee, 386; *Stretch v. Pynn*, 1 Lee, 30; *Cunningham v. Ross*, 2 Lee, 478; *Re-*

pington v. Holland and Repington, 2 Lee, 254; *Lloyd v. Lloyd*, 2 Lee, 321, in preference to a brother.]

(*x*) [*Wingfield v. Wingfield*, 1 Lee, 340.]

(*y*) [*In the goods of J. Williams*, 3 Hagg. 217.]

(*z*) [*Fleming v. Pelham*, in note, 3 Hagg. 217.]

(*a*) [*In the goods of J. Williams*, 3 Hagg. 217.]

To be granted
to the Widow
or next of
Kin.

right may of course be contested on the ground of the invalidity of her marriage (*b*); but where a prior marriage is pleaded in bar to the interests of an asserted widow, strict proof of such marriage is required (*c*). Administration has been granted to a second wife, the first having been divorced *à vinculo* according to the law of a foreign country, of which they were both subjects (*d*). But a second marriage works no defeazance of a wife's right in this matter, although where there are children who would be entitled to two-thirds of the distributive authority, and the mother only to one, such circumstance might induce the court to grant the administration to a child in preference (*e*). Administrations have been granted to the widow where wills have been lost in some instances (*f*). But a wife divorced *à mensa et thoro* forfeits, it should seem, her title to administration (*g*).—ED.]

Grant to
Widow where
Will was lost.

4. To the
Husband of
the Wife's
Effects.

If a *feme covert* die intestate, administration of her goods of right appertaineth to her husband, as her *next and most lawful friend* within the statute (*h*).

And this is confirmed by the statute of the 29 Car. 2, c. 3, which enacteth, that the statute of the 22 & 23 Car. 2, c. 10, concerning the distribution of intestates' effects, "shall not extend to the estates of *femes covert* that shall die intestate, but that their husbands may demand and have administration of their rights, credits and other personal estates, and recover and enjoy the same, as they might have done before the making of the said act (*i*)."

Husband and
Wife.

H., 4 Geo. 2, *The King v. Bettesworth* (*j*). Mandamus to grant administration to John Cullom, of Joan his wife. Return: that by articles before marriage it was agreed, that the wife should have power to make a will, and dispose of her leasehold estate, that pursuant to this power she made a will, and her mother executrix, who hath duly proved the same. To this return it was objected, that she might have things in action not covered by the deed, and the husband was in all events entitled to an administration as to them. Which was agreed to by the court, and a peremptory mandamus was granted.

T., 12 Geo. 2, *The King v. Bettesworth* (*k*). Mandamus to grant administration to Mr. Bridgen, husband of the late

(*b*) [*Plunkett v. Sharpe*, 2 Lee, 35; *Taylor v. Taylor*, 2 Lee, 274; *Browning v. Keane*, 2 Phill. 69.]

(*c*) [*Taylor v. Taylor*, 1 Lee, 571; 2 Lee, 274.]

(*d*) [*Ryan v. Ryan*, 2 Phill. 332.]

(*e*) [*Webb v. Needham*, 1 Add. 494, 496.]

(*f*) [*Vallance v. Vallance and others*, 1 Hagg. 693; *In the goods of*

B. Campbell, 2 Hagg. 555.]

(*g*) [*Pettifer v. James*, Bunb. 16.]

(*h*) 1 Rolle's Abr. 910; [*In the goods of Gill*, 1 Hagg. 341.]

(*i*) [29 Car. 2, c. 3, s. 5. *Vide infra*, "Distribution," for the explanation of this statute.]

(*j*) Str. 891.

(*k*) Str. 1112.

Lady Bellamont, deceased. The dean of the Arches returned, that a suit had been commenced before him, between Mr. Bridgen and a son of the deceased, who claimed to be her executor under a will made by her pursuant to a deed executed before marriage; whereby the husband agreed she should have power to make a will, and dispose of her estate; which deed Mr. Bridgen had confessed, and thereupon sentence had been given for the validity of the disposition, but not for any executorship created thereby: and thereupon a new suit was instituted by the daughter against the son and Mr. Bridgen, for administration with the will annexed; which is still depending. And upon consideration the court declared, that no peremptory mandamus ought to go: for though generally the husband is entitled to the administration as next of kin, yet that is in respect of the interest he has in the estate, and because nobody is in equal degree: and that is the reason why administrations are so often granted to a residuary legatee: and though strictly speaking this is no will, but rather an appointment which is to operate in equity, yet the true question is, whether this is such an intestacy as is within the meaning of the statute. And the law, particularly the 29 Geo. 2, c. 3, considers *femes covert* as having some right to dispose of their effects, which can only be by the agreement of the husband, which appears in this case; and this differs greatly from the case of Cullom, where the power was only as to a leasehold estate, whereas she might have other effects. The matter is properly under the consideration of the spiritual court to whom to grant the administration, and there is no reason for us to interpose; and therefore the return must be allowed.

To the Husband of the Wife's Effects.

And if the husband die before administration taken by him, his executors or administrators, and not the wife's next of kin, shall be entitled in equity (*l*).

As in the case of *Elliot v. Collier*, July 1, 1747 (*m*): One question in the cause was, whether the husband dying without administering to the personal estate the wife had in her own right, it shall go to the next of kin of the wife, or to the representative of the husband. By Lord Hardwicke: "The representative of the wife has no right to an account of her personal estate. That point doth not follow barely the legal right of administration; for though the ecclesiastical court are bound by act of parliament to grant the administration to the next of kin to the wife, yet that doth not bind the right in this court. For the husband surviving the wife, her whole estate vested in him at the time of her death. There are several cases where it has been held, that though the ecclesiastical court are bound to grant administration by 31 Edw. 3, c. 11,

Elliot
v.
Collier.

(*l*) 1 P. Will. 381.

(*m*) 3 Atk. 526.

To the Husband of the Wife's Effects.

yet those persons have been looked upon in this court as mere trustees. Suppose the wife had survived the husband, only such part of her personal estate as had continued *choses in action* would have survived to her; for whatever he had reduced into possession would have been the husband's. Upon the equity of the statute of distribution, this court makes an *administrator de bonis non* only a trustee for such part of the testator's personal estate as is undisposed of, for his next of kin. Therefore I am of opinion, the husband's representative is entitled to the wife's personal estate, and that it vested in the husband before administration was taken out."

[But where a marriage is proved to have been *ab initio* void, from some *impedimentum dirimens*, such as incapacity to contract from madness, prior marriage, &c., the pretended husband has no right to administration. Formerly, *voidable* marriages (*l*) did not disentitle the husband to the administration of his wife's effects, if a sentence of nullity had not been passed during her lifetime. A question as to the legitimacy of the deceased may be raised in the Prerogative Court on a dispute as to the administration of his effects (*m*).

When convicted of Bigamy.

[It seems that a man, convicted of bigamy in respect of his marriage with the intestate, may nevertheless claim administration of her effects in the court of probate, on proof shown of his not having been guilty of the crime, notwithstanding such conviction (*n*). In the event of the husband's dying without having taken out administration to the goods of an intestate wife, the former practice of the court of probate was to decree administration to the next of kin of the wife, and not of the husband (*o*); but in *Fielder v. Hanger* (*p*), Sir John Nicholl directed, that though the modern practice had been otherwise, such grants should in future pass to the husband's representatives, unless cause to the contrary should be shown. But the principle being, that the grant shall follow the interest, if the next of kin have the beneficial interest they shall have the grant. In cases where a *feme covert* is empowered to make her will (*q*), it will sometimes operate as a bar to her husband's right of administration (*r*). If she be empowered to make a will of part of her personalty, probate of that part is taken out, and an *et cæterorum* grant of administration decreed to the husband (*s*); or if she make a will, and appoint no executor,

Husband's Representatives.

What may be a Bar to his Right.

Et cæterorum Grant.

(*l*) [*Browning v. Reane*, 2 Phill. 69; 347.]
but see tit. *Marriage Acts*, vol. ii.]

(*m*) [See the case of *Smyth v. Chamberlayne*, under title *Bastards*, vol. i. p. 119 *b*—119 *f*.]

(*n*) [But on this point, see Mr. Phillips on Evidence, 7th ed. p. 336; and *Wilkinson v. Gordon*, 2 Addams, 152.]

(*o*) [*Reece v. Strafford*, 1 Hagg.

(*p*) [3 Hagg. 769. See as to the former practice, the cases reported in the Appendix to 2 Haggard.]

(*q*) [See "*Who may make*," p. 65.]

(*r*) [*Vide ante*, *Rex v. Bettesworth*, Str. 1112.]

(*s*) [*Rex v. Bettesworth*, 2 Stra. 891, 1118; *Stevens v. Rogwell*, 15 Ves. 139.]

administration *cum testamento annexo* is granted to her husband (*t*). And if she have power to dispose of certain personalty, but no power to appoint an executor, and she makes a will of such property, and does appoint an executor, the court will grant administration *cum testamento annexo* of such personalty to the executor, and an *et cæterorum* administration to the husband (*u*).

To the Husband of the Wife's Effects.

[Where a husband appointed his wife executrix and residuary legatee, and they were drowned by the same shipwreck, there being no proof that the wife survived the husband, it was assumed that they perished at the same moment; and administration was granted to the representatives of the husband (*v*).—ED.]

But if the wife was executrix to another, then, as to the goods which she had in that capacity, administration must be granted to the next of kin to the testator (*w*).

Wife Executrix to another.

[In fact the administration is considered as one *de bonis non* of the testator, and governed by the rules applicable to that kind of administration (*x*).—ED.]

If a *feme covert*, as next of kin, hath a right to administer, the administration ought not to be granted to the husband and wife; for then, if she should die before him, he would continue administrator, against the meaning of the act (*y*).

5. Feme Covert Administratrix.

But it was said, that if it had been granted to them only during the coverture, perhaps it might be good; because, if granted to the wife only, the husband might, during the coverture, have administered (*z*).

If the wife, as residuary legatee, hath a right to take administration, but refuseth, and prays it may be granted to another, and not to her husband, yet it may be granted to her husband (*a*).

For the husband may administer in right of his wife without her consent, but she cannot administer without the consent of her husband (*b*).

[In *Lover v. Lover* (*c*), the Queen's Advocate prayed the court to grant administration to a married woman of a will, in which there were two executors who renounced, and three residuary legatees, two of whom declined; the third was

Court will not grant Administration to a Married Woman, without or against consent of her

(*t*) [*Salmon v. Hays*, 4 Hagg. 386; *Jones*, Bulstr. 45; *Jones v. Roe*, W. Ross v. Ewer, 3 Atk. 160.] Jones, 176.]

(*u*) [*Borley v. Stubbington*, 2 Lee, 537.]

(*x*) [*Vide infra*.]

(*v*) [*Taylor v. Diplock*, 2 Phill. 261; *Wright v. Sarmuda*, ibid. 266; S. C. 2 Salk. 593; *General Stanwin's case*, Fearne's Posthumous Works, 37, by Lord Mansfield; and the almost incredible case of *Broughton v. Randall*, Cro. El. 503.]

(*y*) *Brown v. Wood*, H., 23 Car. 2, Aleyn, 36; Style, 74, 75.

(*z*) Aleyn, 36.

(*a*) *Vanthienen's case*, Fitz-Gibb. 203.

(*b*) *Thrustout v. Coppin*, Black. Rep. 801.

(*c*) [*Jurist*, vol. vi. No. 268.]

(*w*) [*Anon.*, 3 Salk. 21; *Smith v.*

Feme Covert
Administra-
trix.

Husband, in
a case where
he might pos-
sibly be dam-
nified by such
Proceeding.

the applicant. The husband refused his consent, alleging that he was afraid of being involved in Chaucery proceedings (d).

[*Per curiam* : “The general rule is, that a married woman cannot take out administration without her husband’s consent. The cases cited are exceptions to this rule, and are not to be extended by inference beyond the particular circumstances of each. In *Suter v. Christie*, leave was given to the wife to appoint a proctor in the *absence* of her husband, in order to be a party to a cause; but it was under very particular circumstances, and security against costs was given for the protection of the husband’s interests, who was at the Cape of Good Hope. But this case does not at all come up to the mark of the present application. In *the goods of Hardinge*, was a totally different case. The application there was to relieve the husband from responsibility. The proxy of renunciation, tendered by the wife without the husband’s joining in it, was for his benefit. I am satisfied that I cannot decree administration to this lady without, or indeed against, the will of her husband. The utmost that has ever been done in these cases is to call upon the husband to show cause. I must reject the motion.”

[In *Taylor v. Diplocke* (e), a husband appointed his wife executrix and residuary legatee; both he and his wife were drowned at the same time: and it being assumed that both had perished at the same time, administration with the will annexed was granted to the next of kin of the husband. The court has granted administration to a son in preference to a widow divorced for adultery (f).—ED.]

6. Creditor. By King, Lord Chancellor, M., 1725. Notwithstanding the statute of Hen. VIII. administrations have been granted to the principal creditor from the next of kin, by the opinion of both civil and common lawyers, where it is visible that the next of kin cannot have any advantage or benefit of the estate. And this hath been always taken to be out of the statute (g).

Practice be-
fore Grant to.

But this, as it seemeth, should be understood only in case where the kindred refuse to accept the administration. And the practice is usually for the ordinary first to issue a citation for the next of kin in special, and all others in general, to accept or refuse letters of administration, or show cause why the same should not be granted to a creditor. And such creditor must make an affidavit of his debt, and therein set forth how much it is, and how due. And in case there are several creditors, the court generally obliges them to enter into articles and bond of average. For this kind of administration being

(d) [*Suter v. Christie and others*, 1 Add. 150; *In the goods of Hardinge*, 2 Curt. 640.]

(e) [2 Phil. 261.]

(f) [*Vide infra*, “*Distribution*,” and *In the goods of Davies*, 2 Curt. 628.]

(g) *Viner, Executors* (K.), 24.

out of the aforesaid statutes, the same falls back upon the original power which the ordinary had at common law; whereby he may grant administration to whom he pleases, and consequently may insist upon such terms as he thinks reasonable.

Creditor.

[Nevertheless, later cases seem to show that the law is more correctly laid down by Lord Chancellor King than by Dr. Burns, that is to say, that even if the next of kin do *not* "refuse to accept the administration," he may be excluded therefrom by the ordinary on the ground of want of interest (*h*); and certainly, the obligation of the statutes extends only to such persons as are *next of kin at the time of the testator's death* (*i*).

[The practice indeed is most correctly stated by Dr. Burns, for it has become an unfailing maxim of the courts of probate, that where a party, whether executor, residuary legatee, or next of kin, has a *prior* title to a grant of administration, he or they must be cited before it is granted to any other person (*k*). And where there are two persons equally entitled, *e. g.* two universal legatees, the court will grant administration to one after a decree with intimation has issued to the other (*l*).

Two Persons
equally en-
titled.

[Administration is only granted to a creditor failing any other representative (*m*). His right is only this: he cannot be paid his debt till a representative to the deceased is made; he can then call on all who have a right to administer. Before an administration is granted, if a will be produced, the creditor has no right to contradict or deny it; for if there is a will, or a next of kin claims the administration, then a person offers to make himself a representative, and the creditor gets all that he has a right to. But where a creditor has obtained the administration the case is different; he has a right to maintain it against the executor or the next of kin; it is not to be revoked on a mere suggestion (*n*).

Creditor's
Right to Ad-
ministration.

[The court, before granting administration to a creditor, requires an affidavit of the amount of the effects, and of the debt, and that he has no other security (*o*). But the court will allow one creditor to be substituted for another who originally applied for the grant (*p*), and prefers the grant to one creditor (*q*).

(*h*) [See, among others, the cases of *West v. Wilby*, 3 Phill. 381; *Furlonger v. Cox*, cited by Sir J. Nicholl, *ibid.*; *Mayhew v. Newstead*, 1 Curt. 593; *Earl of Warwick v. Greville*, 1 Phill. 123.]

(*i*) [2 Hagg. App. 157; *Rex v. Hay*, 4 Burr. 2295.]

(*k*) [3 Bac. Abr. 41, tit. Exors. (E. 8); *In the goods of Barker*, 1 Curt. 592; *Le Briton v. Le Quesne*, 2 Lee, 261.]

(*l*) [*Pickering v. Pickering*, 1

Hagg. 480; *Law v. Campbell*, *ibid.* 55.]

(*m*) [*Webb v. Needham*, 1 Add. 497.]

(*n*) [*Elma v. Da Costa*, 1 Phill. 177. See also *Skeffington v. White*, 1 Hagg. 702. *Vide infra*, "De bonis non."]]

(*o*) [*Aitkin v. Ford*, 3 Hagg. 193.]

(*p*) [*Maidman v. All Persons in general*, 1 Phill. 53; *Talbot v. Andrews*, 1 Hagg. 697.]

(*q*) [*Harrison and others v. All Persons in general*, 2 Phill. 249.]

Creditor.

When those
first entitled
are Abroad.

[The court, it has been said, requires an affidavit of the amount of the property to be administered; but this is only absolutely necessary where there has been no *personal service* of the usual citation on the parties entitled to the administration in the first instance (r).

[If a person first entitled is abroad, the decree must be served on the Royal Exchange, *and on his agent*, or an affidavit must be made that he has no agent in this country (s). In *Miller v. Washington* (t), where administration to a person being dead was prayed by a creditor, and there had been no personal service on the next of kin (who had no known agent in this country), the court required full information as to the debt, and the cause of the delay, and that notice should be given to the next of kin in the West Indies. And in *Aitkin v. Ford* (u) the court said, where the property is large, and exceeds to a considerable extent the amount of the interest of the party applying for the grant, the court, even where the party first entitled to the grant is abroad, sometimes requires to be satisfied that he has had notice of the intention to apply for such a grant, and frequently directs the matter to stand over till sufficient time has elapsed since the service of the decree for an appearance to be given.

Guardian of a
Minor Resi-
duary Legatee
preferred to
Attorney of
Assignee of
Creditor.

[In the recent case of *Graham v. Maclean and others* (Jan. 20, 1840), a claim for administration was set up by the attorney of the assignee of a creditor residing out of the jurisdiction, in opposition to the prayer of a minor residuary legatee appearing by his guardian. The court decreed it in favour of the minor, observing, "But there is a serious objection on the face of the authority under which the attorney of the creditor appears. The power of attorney has no reference to the estate of this testator more than to that of any other individual on whom the house of Mackintosh & Co. has any claim; the power is general, to sue or bring actions against any persons indebted to that firm; though it is sufficient to entitle the attorney to take out a decree calling upon these parties to accept or refuse probate or administration, or to show cause why administration should not be granted to the creditor, it is not sufficient on which to contest the right of a party *primâ facie* entitled to the grant."

Justifying
Security, &c.

[Justifying security is called for at the court's discretion, according to the circumstances of each case; save that there is *one general rule*, that in all cases where there is not a *personal service of the decree on the party having a prior claim to the grant*, justifying securities are required (x).

(r) [*Martineau v. Rede and others*, 2 Add. 455.]

(s) [*Aitkin v. Ford*, 3 Hagg. 193. See also *Gordon v. Eyre and Dean*, 2 Lee, 262; *Sir Edward Hawke contra omnes*, *ibid.*; and *Woolley v. Gordon*

and *Greene*, 3 Phill. 314, for cases of service on the Royal Exchange where next of kin were abroad.—Ed.]

(t) [3 Hagg. 277.]

(u) [3 Hagg. 193.]

(x) [*Aitkin v. Ford*, 3 Hagg. 193.]

[Administration, as to a creditor, has been granted to the mother of an intestate who had been advanced by her; the father, though alive, having been divorced in the Commissary Court of Scotland, and married again (*y*).]

Creditor.
Who is a
Creditor.

[The joint assignee of the estate of a bankrupt with the deceased, out of which the latter had applied a sum of money to his own use, for which he had not accounted at the time of his death, is not a creditor to the estate of the deceased so as to be entitled to pray administration to him (*z*). Nor where a partner dies, leaving partnership accounts unsettled, can a person, to whom one of the surviving partners has assigned his share, claim administration as a creditor to the deceased partner, though a person nominated by him may obtain a limited grant to substantiate proceedings in Chancery, on the refusal of the next of kin, and due cause shown (*a*).]

[Administration will be decreed to a *bond* creditor in preference to another creditor (*b*). And to a person who, being a bond creditor, has also a mortgage on leasehold property; if the grant is prayed by a mortgagee of real property, there may be a reason why the administration should not pass to him, because it would give him priority, and exclude simple contract creditors (*c*).]

Bond Cre-
ditor.

[A creditor having administration may oppose will without costs (*d*); and being in possession of it, is entitled to contest a suit against a person asserting himself to be next of kin (*e*); but a creditor has no right to interpose in the grant of an administration under the statute (*f*).]

Rights of
Creditor after
Grant.

[An administration, with the will annexed, may be granted to a creditor, limited to a particular purpose, *e. g.* filing a bill in equity (*g*).]

[Letters of administration, which had been granted to the executors of a creditor, were, in *Jones v. Beytagh and Beytagh*, rescinded before they had passed the seal, at the suit of the executor of a residuary legatee (*h*).]

[It may happen that the appointed executor should die *before* the testator; and in these cases, as well as those men-

7. Admi-
nistration
cum Testa-
mento an-
nexo (*i*).

(*y*) [*Aitkin v. Ford*, 3 Hagg. 193.]

(*z*) [*Snape v. Webb*, 2 Lee, 411.]

(*a*) [*Cawthorn v. Chalie*, 2 Sim. & Stu. 129, case laid by order of Vice-Chancellor Leach before Dr., now Sir Herbert, Jenner.]

(*b*) [*Kearney v. Whitaker*, 2 Lee, 324; *Carpenter v. Shelford*, ib. 502.]

(*c*) [*Roxburgh v. Lambert*, 2 Hagg. 557.]

(*d*) [1 Phill. 160, note.]

(*e*) [*Elme v. Da Costa*, 1 Phill. 173.]

(*f*) [*Stretch v. Pynn*, 1 Lee, 30.]

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(*g*) [*Wooley v. Gordon and Greene*, 3 Phill. 314.]

(*h*) [3 Phill. 635.]

(*i*) [Oughton says, tit. CCIX., n. 2, "De Causis Testamentariis," (vol. i. p. 324), "Præter autem literas administrationis simplices solent etiam judices ecclesiastici concedere—

Literas administrationis cum testamento annexo,

— bonorum inadministratorum,

— durante absentia partium in remotis agentium,

— durante minori ætate,

B B

Administra-
tion *cum*
Testamento
annexo.

tioned above of the executor *refusing* or *dying intestate* (*k*), the ordinary grants an administration which is called *cum testamento annexo*, or, where a part only of the goods of the testator have been administered, an administration *de bonis non* (*l*). The will to which the administration is *annexed* requires probate like an ordinary will, and the office of administrator differs very little from that of an executor (*m*). So it is said by Bishop Gibson.

To Residuary
Legatee.

[It is the practice of the court to grant this administration to the residuary legatee, but it is not bound and cannot be compelled by *mandamus* (*n*) to do so; but where the same person is both residuary legatee and next of kin, the ordinary is not warranted in refusing administration *cum testamento annexo* to him when the executors renounce (*o*).

If he refuses.

[And if the residuary legatee declines, according to usual practice the court of probate offers administration with the will annexed, to the next of kin; nevertheless, it has been repeatedly laid down, that the principle and object of the statutes of administration is to vest the right to administration in the person who is possessed of the *beneficial interest* in the personal estate, and therefore, where the next of kin has no interest in the property, he is *by the spirit*, though *contrary to the letter*, of the statute excluded, and the administration is granted to a person who has the interest in the effects (*p*). The rule, as now established, is, that the *right of administration follows the right of property* (*q*).

Representa-
tive of Resi-
duary Lega-
tee.

[Where the residuary legatee, *having a beneficial interest*, survives the testator, his representative has the same right, by the practice of the courts of probate, to administration *cum testamento annexo* as the residuary legatee himself (*r*); and the same rule applies if the residuary legatee be also executor, his representative, and not the next of kin to the original testator, shall have the grant of administration with the will annexed (*s*).

[In *Wetdrill v. Wright* (*t*), the testator made his wife residuary legatee for life, and substituted his daughter after her

Literas durante corporis aut animi
vitio,
— pendente lite,
— in usum jus habentium,
— administrationis limitas,
— in juris subsidium et ad corro-
borandum processum in Foro
Seculari vel Curia Cancellariae, &c.—ED.]

(*k*) [And, of course, where he is incapable of acting, see p. 152.]

(*l*) [*Vide post.*]

(*m*) [Com. Dig. Administrator, (b. i.); 2 Bl. Com. 505; *Graysbrook v. Fox*, 1 Plow. 279.]

(*n*) [*Rex v. Bettesworth*, 2 Stra.

956, cited above.]

(*o*) [*Linthwaite v. Galloway*, 2 Lee, 414.]

(*p*) [2 Hagg. 149, Appendix; Sir John Nicholl in *West and Smith v. Willby*, 3 Phill. 381.]

(*q*) [*In the goods of Gill*, 1 Hagg. 341.]

(*r*) [*Thomas v. Baker*, 1 Lee, 341; *Wetdrill v. Wright*, 2 Phill. 243; *Jones v. Beytagh*, 3 Phill. 635.]

(*s*) [*Isted v. Stanley*, Dyer, 372, citing the Judge of the Prerogative Court; *Farrington v. Knightley*, 1 P. Wms. 553.]

(*t*) [2 Phill. 243.]

death; the widow proved the will, and afterwards both she and her daughter died. The court granted administration with the will annexed to the representative of the daughter in preference to the representative of the mother.

Administra-
tion cum
Testamento
annexo.

[If there is no residuary legatee, the grant goes to the next of kin; if they decline, to a legatee or creditor (u).]

[In *Pipon v. Wallis* (x), an executor resided out of the jurisdiction, and administration *cum testamento annexo* had been granted absolutely to another person under a letter of attorney from the executor for his use and benefit, according to the usual form; it was held, that when he revoked it, and desired probate, that the court was bound to grant it to him.

Executor
out of Juris-
diction.

[In the goods of *James Hardstone* (y) it was said, on renunciation of a co-executor, the court will not grant administration with the will annexed, without justifying securities to the daughter, the residuary legatee, during the lunacy of the mother, the other executor (z).

Renunciation
of Co-Execu-
tor.

[Form of Grant of Administration cum Testamento annexo.

"We, being desirous that the said goods, chattels, and credits, may be well and faithfully administered, applied and disposed of, according to law, do therefore, by these presents, grant full power and authority to you, in whose fidelity we confide, to administer and faithfully dispose of the said goods, chattels and credits according to the tenor and effect of the said will; and first to pay the debts of the said deceased, which he did owe at the time of his death, and afterwards the legacies contained and specified in the said will, so far as such goods, chattels and credits will thereto extend, and the law requires; you having been already sworn well and faithfully to administer the same; and to make a true and perfect inventory of all and singular the said goods, chattels and credits, and to exhibit the same into the Registry of our Prerogative Court of Canterbury, on or before the — day of — next ensuing; and also to render a just and true account thereof. And we do by these presents ordain, depute, and constitute you administrator of all and singular the goods, chattels and credits of the said deceased, with the said will annexed."

[It has been said that if an executor die without having proved the will, or intestate without having fully administered the effects of the testator, the executorship is not transmitted to his executor, who must take out administration with the will annexed (a); this is distinct, it should be observed, from a grant *de bonis non administratis*,—this kind of grant becomes necessary where a sole or surviving executor has died intestate after taking out probate of the will of the original

8. A Grant
de Bonis
non admi-
nistratis.

(u) [*Korystra v. Bayskes*, 3 Phill. 531; *In re Hinchley*, 1 Hagg. 477; *Snape v. Webb*, 2 Lee, 411.]

(z) [See also *In the goods of James Milnes, Esq.* 3 Add. 55.]

(x) [1 Lee, 402.]

(a) [*Wankford v. Wankford*, 1 Salk. 308.]

(y) [1 Hagg. 487.]

A Grant *de Bonis non administratis*.

Where Executor does not leave transmissible Interest.

Effect of the Death of one of several Administrators.

Distinction between the Executor of an Executor and the Executor of an Administrator of a third Person.

Where Administrator dies, &c.

testator. Again, if there be several executors, and one alone takes out probate, the rest renouncing, no interest is transmissible to the executor of the one who *has* proved at his death; the co-executors may, if they please, retract their renunciation, for it is held that the representation survives to them, but if they do not choose to do so, recourse must be had to an *administration de bonis non* (b).

[Where administration has been granted to two, and one dies, the survivor will be sole administrator, for the office survives like that of an executor (c). Mr. Justice Blackstone states, with his usual perspicuity, one very material distinction between them (d):—"The interest, vested in the executor by the will of the deceased, may be continued and kept alive by the will of the same executor; so that the executor of A.'s executor is to all intents and purposes the executor and representative of A. himself (e); but *the executor of A.'s administrator, or the administrator of A.'s executor, is not the representative of A. (f)*. For the power of an executor is founded upon the special confidence and actual appointment of the deceased, and such executor is therefore allowed to transmit that power to another in whom he has equal confidence; *but the administrator of A. is merely the officer of the ordinary, prescribed to him by act of parliament, in whom the deceased has reposed no trust at all*, and therefore, on the death of that officer, it results back to the ordinary to appoint another. And with regard to the administrator of A.'s executor, he has clearly no privity or relation to A., being only commissioned to administer the effects of the intestate executor, and not of the original testator. Wherefore in both these cases, and whenever the course of representation from executor to executor is interrupted by any one administration, it is necessary for the ordinary to commit administration afresh of the goods of the deceased not administered by the former executor or administrator. And this administrator, *de bonis non*, is the only legal representative of the deceased in matters of personal property (g). But he may, as well as an original administrator, have only a *limited* or *special* administration committed to his care, viz. of certain specific effects, such as a term of years and the like, the rest being committed to others (h)."

[The rule of beneficial interest mentioned above governs the court in its choice of the party to whom this grant of administration *de bonis non* shall be issued (i), both in the cases just described of an executor not leaving a transmissible inte-

(b) [Arnold v. Blencowe, 1 Cox, 426.]

(c) [Com. Dig. Adm. (B. 7); 3 Bac. Abr. 56, tit. Exors.; Eyre v. Lady Shaftesbury, 2 P. Wms. 121; Jacomb v. Harwood, 2 Ves. sen. 268; Adam v. Buckland, 2 Vern. 514.]

(d) [Vol. ii. p. 506.]

(e) [Stat. 25 Edw. 3, st. 5, c. 5; 1 Leon. 275.]

(f) [Bro. Abr. tit. Adm. 7.]

(g) [Styl. 225.]

(h) [1 Rolle's Abr. 908; Godolph. p. 2, c. 30; Salk. 36. Vide post.]

(i) [Akers v. Dupuy, 1 Hagg. 473.]

rest, and also of an administrator dying before he has fully administered, or of one entitled to administration dying before he has taken out letters of administration. With respect to an *original* administration and one *de bonis non* there exists no distinction as to the obligation of the statutes of administration (*k*).

A Grant de
Bonis non ad-
ministratis.

[A review of all the cases seems to show, that the discretion of the court as to this grant is very large. Certainly, where the *next of kin at the time of the death* of the intestate are deceased, the court is free from the obligations of the statute and follows its own rules (*l*). It has held itself not obliged to make this grant to the largest interest (*m*), though its general inclination is to do so (*n*). Thus, by modern practice, it does not consider the next of kin to a wife to have an absolute statutable right to administration *de bonis non*, but grants it to the husband if the beneficial interest be vested in him (*o*).

[Between the widow and the next of kin there are many instances where the court has set aside the former: and between different next of kin and between several residuary legatees where the parties stand on an equality of right, the court exercises a discretion, but it has seldom, if ever, set aside a residuary legatee in favour of a mere legatee (*p*); though it has granted administration *de bonis non*, limited to a certain legacy granted to the representative of the substituted legatee without citing the representative of the residuary legatee (*q*).

[It should be observed that, according to the general practice, a party *having a direct interest is preferred to those entitled in a representative character* (*r*), and therefore a person *originally* in distribution is preferred to the *representative* of the next of kin (*s*).

[Where a creditor has obtained administration (*t*) and died leaving goods unadministered, an administration *de bonis non* ought not to be granted without citing the *then next of kin*, especially if the beneficial interest be vested in them, even though all the next of kin at the time of the *original* grant to the creditor are deceased (*u*).

Where a
Creditor
dies having
administered
in Part.

[In the goods of *Ann Sowerby* (a very recent case), application was made to the court to grant administration *de bonis*

(*k*) [*Kindleside v. Cleaver*, 1 Hagg. 345; *S.C.*, 2 Hagg. App. 169; *Walton v. Jacobson*, 1 Hagg. 346.]

(*l*) [*Cardale v. Harvey and others*, 1 Lee, 177.]

(*m*) [*Cardale v. Harvey and others*, 1 Lee, 177.]

(*n*) [*Savage v. Blythe*, 2 Hagg. App. 150; *Almes v. Almes*, *ib.* 155.]

(*o*) [*Fielder v. Hanger*, 3 Hagg. 769; *In the goods of Pountney*, 4 Hagg. 290.]

(*p*) [*Atkinson v. Barnard*, 2 Phill. 317.]

(*q*) [*In the goods of Martha Stedman*, 2 Hagg. 59.]

(*r*) [*In the goods of Ann Middleton*, 2 Hagg. 60.]

(*s*) [2 Hagg. 157; *In the goods of Frederick Stables*, 3 Hagg. 560.]

(*t*) [*Vide supra*, "6. Creditor."]

(*u*) [*White v. Skeffington*, Delegates reversing Sir J. Nicholl's judgment, 2 Hagg. 626.]

A Grant de
Bonis non ad-
ministratis.

non of the effects of a *first* wife to the representative of the *second* wife, who had taken out administration to her deceased husband; Sir Edward Simpson's remarks were cited in *Hole v. Dolman* (v), "that when the next of kin who were so at the death of the deceased were dead, it was in the heart of the court to grant it to the next of kin on the interest, and the grant does not depend on the statute but the rules of the court." *Per curiam*: "I cannot without a decree first against the next of kin of the husband. I admit that there is no statutable right, and that it is in the discretion of the court; but that *discretion must be exercised on some principle as a part of the practice of the court*; there should be a representative of the husband in the first instance, and then his representative would be entitled to a grant of administration to the first wife who was the possessor of the property; my impression is, that these parties are entitled in the first instance."—July 8th, 1841.

[*Form of Letters of Administration de Bonis non.*

[*"W., by Divine Providence, Archbishop of Canterbury, Primate of all England, and Metropolitan, to our well-beloved in Christ, R. L. esquire, one of the natural and lawful children of E. L. (wife of S. L. esquire), late of — in the county of —, deceased, greeting: Whereas the said E. L. (as is alleged) lately died intestate, having whilst living, and at the time of her death, goods, chattels or credits, in divers dioceses or jurisdictions, since whose death, administration of all and singular the goods, chattels and credits of the said deceased was committed and granted to the said S. L. esquire, the lawful husband of the said deceased, who after taking such administration upon him intermeddled in the goods, chattels and credits of the said deceased, and afterwards died, leaving some part thereof unadministered, and not fully disposed of: And we, being desirous that the said goods, chattels and credits may be well and faithfully administered, applied and disposed of according to law, do therefore by these presents grant full power and authority to you, in whose fidelity we confide, to administer and faithfully dispose of the goods, chattels and credits left unadministered as aforesaid, and to ask, demand, recover and receive whatever debts and credits, which whilst living, and at the time of her death, did anyway belong to the estate, and to pay whatever debts the said deceased at the time of her death did owe, so far as such goods, chattels and credits will thereto extend, and the law requires, you having been already sworn well and faithfully to administer the same, and to make a true and perfect inventory of all and singular the said goods, chattels and credits, and to exhibit the same into the registry of our Prerogative Court of Canterbury, on or before the — day of — next ensuing; and also to render a just and true accompt thereof, on or before the — day of — which shall be in the year of our Lord one thousand eight hundred and —. And we do, by these presents, ordain, depute and constitute you administrator of all and singular the goods, chattels and credits of the said deceased, left unadministered as aforesaid. Given at London, the — day of — in the year of our Lord one thousand eight hundred and —, in the — year of our translation."*—ED.]

(v) [Reported *Savage v. Blythe*, 2 Hagg. App. 644.]

There are also other administrations, which are not within the statutes aforesaid. These administrations not being within the statute 21 Hen. 8, c. 5, the ordinary is not bound to grant them to the next of kin (*w*). They are usually termed limited administrations, being limited to a particular *time* or purpose. Among the latter we have to consider administration during absence out of the kingdom: concerning which, in the case of *Clare v. Hedges*, E., 3 Will. 3, it was held clearly by the court, that such administration is grantable by law, and that it may be a great conveniency so to do; for if the next of kin be beyond sea, and such administration could not be granted, the debts due to the intestate might be lost (*x*).

9. Temporary Administration.

As during Absence out of the Kingdom.

And in the case of *Slater v. May*, M., 3 Anne, Holt, C. J., said, that it was reasonable there should be such an administrator, and that this kind of administration stood upon the same reason as an administration during the minority of an executor, namely, that there should be one to manage the estate of the testator, till the person appointed by him is able (*y*).

[If a testator has appointed an executor, and limited the period as to when he shall begin his office, the ordinary may grant administration for the interim.

Other kinds of limited Administrations.

[In the goods of *Sir Theophilus Metcalfe*, who had left a will in India, the court was prayed to decree administration to a particular person “until the last will and testament of the said deceased, or an authentic copy thereof, should be transmitted to this country.”

[Sir John Nicholl said (*z*), “The court is disposed, under the circumstances, to accede to this application, although it is one of a novel aspect. The deceased cannot be sworn to have died *intestate*; having, according to his own declaration, left a will in India. An administration *pendente lite* is out of the question, as no suit in this court relative to the deceased’s affairs is, or ever may be, depending. Nor can there be an administration *as during absence out of the kingdom*, or the minority of an executor, or the like; for *non constat* who the executor is, or even whether there be an executor. At the same time, an interval of considerable length must elapse before the deceased’s will can be forwarded from India—in which interval it may, as stated and sworn, be very material, that some person should be authorized, as well to receive and invest the interest due and accruing upon the deceased’s stock, &c. as to act, generally, for the protection and management of his property in other particulars. Under these circumstances, considering the reasonableness of the application, and that all

(*w*) [See *Briers v. Goddard*, Hob. 250; *Thomas v. Butler*, 1 Vent. 219; and *Smith’s case*, *supra* and *infra*.] Walker v. Woolaston, 1 P.Wms. 579.
 (*x*) 1 Lutw. 342; [S. C. cited in] (y) 2 Ld. Raym. 1071; [S. C. 2 Salk. 42; 8 Mod. 304.]
 (*z*) [1 Add. 344.]

Temporary
Administra-
tion.

parties *apparently* interested are consenting, I think that I am bound to comply with this prayer (a)."

[Where a will proved to have been in existence after the testator's death, is accidentally lost, the court will grant administration limited until the original will be found and brought into the registry (b).

[An administration may be also granted, *limited* to certain specific effects of the deceased, while another person is possessed of the *general* administration. A very common instance is, where the personal administration of a person deceased is broken, and its revival is necessary merely for the performance of a single act; for example, to make an assignment of a term of years.

Administra-
tion for carry-
ing on Suits
at Law or
Equity.

[But if the executor went abroad after obtaining probate, the court would not grant new administration merely on the ground of his absence from the kingdom; nor would the Court of Chancery lend its aid by appointing a receiver (c).

Executor
abroad.

[These inconveniences produced 38 Geo. 3, c. 87, (Mr. Simeon's Act,) which provided—

38 Geo. 3,
c. 87.

["Whereas the laws now existing are not sufficient to enforce a speedy distribution of the assets of deceased persons where the executor to whom probate of the will hath been granted is out of the jurisdiction of his majesty's courts of law and equity; be it therefore enacted, &c. That at the expiration of twelve calendar months from the death of any testator, if the executors or executor to whom probate of the will shall have been granted, are or is then residing out of the jurisdiction of his majesty's courts of law and equity, it shall be lawful for the ecclesiastical court which hath granted probate of such will, upon the application of any creditor, next of kin, or legatee, grounded on the affidavit hereinafter mentioned, to grant such special administration as hereinafter is also mentioned; which administration shall be written or printed upon paper or parchment stamped only with one five shilling stamp, and shall pay no further or other duty to his majesty, his heirs or successors.

If, at the Ex-
piration of 12
Months from
a Testator's
Decease, the
Executor to
whom Pro-
bate is grant-
ed, shall not
reside within
the Jurisdic-
tion of his
Majesty's
Courts, a
Creditor, &c.
may obtain
Special Ad-
ministration
on a 5s.
Stamp.

[Sect. 2. "That the party applying to the spiritual court to grant such administration as aforesaid, shall make an affidavit in the following words, or to the purport and effect following:

The Party
applying to
make the fol-
lowing
Affidavit.

['I, A. B., — of — do swear, that there is due and owing to me, upon bond or simple contract, or upon account unsettled, as the case may happen to be, (in which latter case he shall swear to the best of his belief only,) from the estate and effects of — deceased, the sum of —, and that C. D., the only executor capable of acting, and to whom probate hath been granted, hath departed this kingdom, and is now out of the jurisdiction of his majesty's courts of law and equity, and that this deponent is desirous of exhibiting a bill in equity in his majesty's court of — for the purpose of being paid his demand out of the assets of the said testator.'

(a) [The further proceedings in this case, under the name of *Howell v. Metcalfe*, afford samples of several different kinds of limited administrations, 2 Add. 348.—Ed.]

(b) [In the goods of *Campbell*, 2 Hagg. 555.]

(c) [*Taynton v. Hannay*, 3 Bos. & Pull. 30.]

[Sect. 3. "That the administration to be granted pursuant to this act shall be in the form hereinafter mentioned; (that is to say,) 38 G. 3, c. 87.

['— by Divine Providence, Archbishop of Canterbury, Primate of all England and Metropolitan, to our well-beloved in Christ — greeting: Whereas it hath been alleged before the Worshipful —, Doctor of Laws, Surrogate of —, Doctor of Laws, Master Keeper or Commissary of our Prerogative Court of Canterbury, lawfully constituted by you the said —, that — did, whilst living, and of sound mind, memory, and understanding, make and duly execute his last will and testament in writing, and did therefore nominate, constitute, and appoint — his executors, [or, sole executor,] who in the month of — proved the said will by the authority of our said court, and now reside [or, resides] out of this kingdom, and out of the jurisdiction of his majesty's courts of law and equity (as in and by an affidavit duly made and sworn to by —, and brought into and left in the registry of our said court, reference being thereunto had will more fully and at large appear): And whereas the surrogate aforesaid, having duly considered the premises, did, at the petition of the said —, decree letters of administration of all and singular the goods, chattels, and credits of the said —, deceased, to be committed and granted to you the said —, named by or on behalf of the said —, a creditor, (legatee) or (one of the next kin) of the said deceased [as the case may be], limited for the purpose, to become and be made a party to a bill or bills to be exhibited against you in any of his majesty's courts of equity, and to carry the decree or decrees of any of the said court or courts into effect, but no further or otherwise (justice so requiring): And we being desirous that the said goods, chattels, and credits may be well and faithfully administered, applied, and disposed of according to law, do therefore, by these presents, grant full power and authority to you, in whose fidelity we confide, to administer, and faithfully dispose of the said goods, chattels, and credits, according to the tenor and effect of the said will, limited as aforesaid, so far as such goods, chattels, and credits of the deceased will thereto extend, and the law requires, you having been already sworn well and faithfully to administer the same, and to make a true and perfect inventory of all and singular the said goods, chattels, and credits, so far as the same may come to your hands, and to exhibit the same into the registry of our said Prerogative Court of Canterbury, on or before the — next ensuing, and also to render a just and true account thereof: And we do by these presents ordain and constitute you administrator of all and singular the goods, chattels, and credits of the said deceased, limited as aforesaid, but no further, or otherwise.

Temporary Administration.

Administration to be granted in the following Form.

['Given at London, the — day of —, in the year of our Lord —, and in the — year of our translation.'

[Sect. 4. "That it shall be lawful for the court of equity in which such suit shall be depending, to appoint (if it shall be needful) any persons or person to collect in any outstanding debts or effects due to such estate, and to give discharges for the same, such persons or person giving security in the usual manner, duly to account for the same.

Court of Equity may appoint Persons to collect outstanding Debts.

[Sect. 5. "That it shall be lawful for the accountant-general of the High Court of Chancery, or for the secretary, or deputy secretary, of the governor and company of the Bank of England, to

Stock belonging to the Estate of the Deceased,

38 G. 3, c. 87.

Temporary
Administration.

may be transferred into the Name of the Accountant General in Chancery, in Trust for such Purposes as the Court shall direct in any Suit.

Executor, returning to reside within Jurisdiction of the Court, to be made a Party in such Suit.

Limitation
of Statute.

transfer, and for the governor and company of the Bank of England to suffer a transfer to be made of any stock belonging to the estate of such deceased person, into the name of the accountant-general, in trust, for such purposes as the court shall direct, in any suit in which the person to whom such administration hath been granted, shall be, or may have been, a party: Provided nevertheless, that if the executors or executor capable of acting as such, shall return to and reside within the jurisdiction of any of the said courts pending such suit, such executors or executor shall be made party to such suit, and the costs incurred by granting such administration, and by proceeding in such suit against such administrator, shall be paid by such person or persons, or out of such fund as the court where such suit is depending shall direct."

[This statute, although entitled only "An Act for the better Administration of *Assets* where the Executor to whom Probate is granted is *out of the Realm*," is equally applicable where an executor, though *not out of the realm*, is out of the jurisdiction and out of the reach of her majesty's English courts of law and equity (a).

[It has been decided that the statute is limited to *proceedings in Chancery*. In the goods of *Thomas Davies* (b), the executor had obtained probate, and was resident at the Cape of Good Hope, and a personal representation of him had become necessary for the renewal of a lease of a house in London. *Per curiam*: "This case is under circumstances of hardship; but how can the court grant this application? The executor of the executor is living at the Cape of Good Hope, it is true; but still he is a full and complete representative. Mr. Simeon's Act does not apply to the present case; it applies only when there are proceedings depending in Chancery; but it is to be lamented that this statute was not made more extensive; for at present there certainly is a defect in the law and in the power of these courts. There is, however, another remedy, viz. a power of attorney from the executor at the Cape. Whenever this court exercises its discretion in making a grant *durante absentia*, it is on the ground that there is no legal representative. I must reject the present application."—ED.]

And the authority of an administrator appointed according to the provisions of this act during the absence of an executor from this country, does not become actually void upon the death of such executor, but is only voidable (c). The administration is not for a *limited period*, but for a *limited purpose*: viz. to be made a party to suits in equity; and the effect of the return of the executor is, that he must be made a party in the usual course: and then the temporary administrator may ac-

(a) [*Hannay v. Taynton*, 2 Add. 504.]

505, before Sir W. Wynne; S. C. 3

Bos. & Pull. 26, Lord Eldon; In the goods of *Rev. Cavalier Jouet*, 2 Add.

(b) [2 Hagg. 80.]

(c) *Taynton v. Hannay*, 3 Bos. & Pull. 26.

count, have his costs, and be discharged, but the proceedings had are not put an end to (*d*).

Temporary
Administra-
tion.

[*In the goods of James Cassidy*(*e*). Administration *cum testamento annexo*, which had been granted to an attorney of an executor who was abroad, was not *revoked*, but pronounced to have *ceased* and *expired* on application of the executor for probate, and on affidavit that no suits were pending. The court directed “that in future grants *durante absentia* to attornies should be limited ‘for the use and benefit of —, resident at —,’ and until the executor (or the party entitled to the administration) *should duly apply for and obtain probate*, or administration.”

[It was decided in the case of *Taynton v. Hannay* (*f*), by the Court of Common Pleas, that the death of the executor does not determine a temporary administration.

[An administration, *de bonis non*, was granted in 1827, of an intestate, who died in 1790, limited to assign a leasehold property not severed in the deceased’s lifetime, and only mortgaged during an original creditor administration (which was granted on the renunciation of the next of kin at the time of the death and which expired in 1806)—revoked; the next of kin for the time being (in whom all the beneficial interest in the deceased’s estate was vested) not having been cited when the limited grant was made, and there being a suggestion that such grant was surreptitiously obtained, and that there was a surplus belonging to the deceased’s estate (*g*).

Where re-
voked.

[Where administration was granted in 1791, on the renunciation of the next of kin to a creditor who died in 1806; when no *de bonis* grant was taken out till March, 1827, and when an administration limited to certain leasehold property, and granted at that time (without citing the next of kin) to a nominee of the persons in possession of such property, was in February, 1828, called in by the representative of the next of kin; such representative held barred by time and circumstances, and the administrator, who appeared under protest, dismissed with costs (*h*).

Where not
revoked.

[It is the practice of the office not to receive the renunciation of an executor, &c., without the original will. Hence the court, when applied to for letters of administration, limited to assign a satisfied term of years to the nominee of the owner of the fee, (in which case, it is not the practice of the office to annex the original will,) on the renunciation of the party entitled to administration of the deceased’s effects, with her will

What the
Court will
require pre-
vious to the
Grant.

(*d*) [*Raynsford v. Taynton*, 7 Ves. 460; *Slates v. May*, 2 Ld. Raym. 1071.] (*e*) [*Raynsford v. Taynton*, 7 Ves. 460; *Slates v. May*, 2 Ld. Raym. 1071; *Rush v. Peacock*, 2 Moo. & Rob. 162.]

(*e*) [4 Hagg. 360.]

(*g*) [*Skeffington v. White*, 2 Hagg.

(*f*) [Cited above, 3 Bos. & Pull. 36. As to actions at common law brought against an administrator *durante ab-*

626.]

(*h*) [*Skeffington v. White*, 1 Hagg. 699.]

Temporary
Administration.

annexed, in preference to receiving the renunciation without the original will, (this not being to be had,) decreed the party entitled to be cited to accept or refuse, &c.; promising to grant the administration to the nominee of the owner of the fee on the other's default (*n*).

Power of the
Prerogative
Court in re-
spect of satis-
fied Term in
another Dio-
cese.

[The prerogative court granted an administration, limited to assign a term in the diocese of A., the will of the deceased (who had no goods out of the diocese of B., except this satisfied term) having been proved in the Court of B., and the chain of executors being subsequently unbroken (*o*).

[The court will not enforce a monition to transmit the original will proved in an inferior jurisdiction, where the deceased died, but will grant a limited administration to assign a satisfied term, situate in another diocese (*p*).

Limited to a
particular
Place,

[The administration may be, as we have seen from the cases just mentioned, limited to a particular place. And where a trustee has died, leaving the whole of his beneficial property in the province of one archbishop, and the trust property in the province of another; and where his executors in consequence *declined* to prove the will in the latter province, administration, with the will annexed, has been granted under such circumstances to the party beneficially entitled under the trust limited to his interest in the trust property (*q*). Nevertheless the general rule, strictly speaking, seems to be, that though two administrations may well subsist together where there is no executor, yet that where there is one, he being *universi juris hæres* to the testator, there can be no administration (*r*).

To carry on
Proceedings
in Chancery.

[It is every day's practice of the Prerogative Court to grant administration limited to carrying on proceedings in the Court of Chancery (*s*); and it has limited one to filing in a bill in equity (*t*).

[*In the goods of Martha Steadman* (*u*). An administration, *de bonis non*, limited to a certain *legacy*, was granted to the representative of the substituted legatee, and without citing the representative of the residuary legatee, resident abroad, but by practice entitled to the general *de bonis non* grant; but in this case no claim to the legacy had, since the death in 1797 of the residuary legatee (who was also executor and legatee for life), been made by his representative; and this application was made in 1828.

(*n*) [*In the goods of Martha Fenton, deceased*, 3 Add. 35.]

(*o*) [*In the goods of Mary Powell*, 3 Hagg. 195.]

(*p*) [*Crosley v. The Archdeacon of Sudbury and others*, 3 Hagg. 197.]

(*q*) [*In the goods of Ferrier*, 1 Hagg. 241; *Le Briton v. Le Quesne*, 2 Lee, 261; *In the goods of Powell*, 3 Hagg. 195.]

(*r*) [See the decision of the Delegates, in *Coswall v. Morgan*, 2 Lee, 571.]

(*s*) [*In the goods of the Elector of Hesse*, 1 Hagg. 93; *Harris v. Millburn*, 2 Hagg. 62, &c.]

(*t*) [*Woolley v. Gordon*, 3 Phill. 315.]

(*u*) [2 Hagg. 59.]

[In all cases of limited administrations, the parties entitled to a general grant may take out an *et cæterorum* administration (x).—ED.] Temporary Administration.

We come now to the consideration of administration pending a suit, or if there be no controversy, then until the executor comes in, which, as well as the last before mentioned, do fall of course, as soon as the consideration ceaseth upon which they were first granted (y). 10. Administration pendente Lite.

And such administrator may maintain an action for recovering the debts due to the deceased (z).

[The courts of common law have ceased to object to the grant of administrations *pendente lite*, where there is an executor named in the will propounded. Such administrations ought not to be granted without good reason (a). General Rule.

[It is not usual to grant an administration *pendente lite* to either of the parties contesting suit, but to some indifferent person (b); though such a grant has been made (c).

[An application for an administration *pendente lite* will be rejected where no special cause for granting it is set forth (d).

[An administration pending suit is never granted upon motion, unless by consent. If the parties are agreed, both that an administration is necessary, and who the administrator shall be, it may be granted on motion. In any other case, an act on petition must be gone into, the necessity for an administration pending suit must be shown, and the court must be satisfied as to the fitness of the proposed administrator, or must be placed in a condition to determine between the two, (its most usual office upon such occasions), an administrator, that is, being proposed by each party (e). When granted on Motion.

[The court has been constantly in the habit of refusing to grant administrations, pending suit, merely to take property out of the hands of a litigant party in the actual possession of it. It has always required it to be shown that the property was in jeopardy, that the party sought to be dispossessed was irresponsible, and refused or neglected to furnish adequate and reasonable security. On the other hand, it has as constantly declined putting a litigant party in possession of the property, by granting administration to him pending suit; always granting it, where requisite, to a nominee presumed to be indifferent between the contending parties (f). Principles which govern the Court, generally.

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|--|--|
| (x) [Harris v. Milburn, 2 Hagg. 62.] | Lee's R. 49.] |
| (y) Gibs. 574; 2 Bac. Abr. 415; [Walker v. Woolaston,] 2 P.Wms. 576. | (c) [Colvin v. Fraser, 2 Hagg. 613; see also Hellier v. Hellier, 1 Lee, 281; Bond v. Bond, ibid. 333.] |
| (z) [Walker v. Woolaston,] 2 P.Wms. 576; [Willis v. Rich,] 2 Atk. 285. | (d) [Sutton v. Smith and others, 1 Lee's R. 207.] |
| (a) [Maskeline and Brohier v. Harrison, 2 Lee's R. 258.] | (e) [Northey v. Cock, 1 Add. 329, (Sir John Nicholl.)] |
| (b) [Stratton v. Ford and others, 2 | (f) [Ibid.] |

Adminis-
tration *pen-
dente Lite.*

[An administrator, *pendente lite*, will be appointed; such appointment being necessary from the nature of the deceased's property, and from the conduct of one of the parties in the suit; and the nominee of the other party, on whose conduct there is no imputation, may be selected, if shown to be impartial, competent, and responsible (o).

As to Nomi-
nees.

[*Hellier v. Hellier* (p). An administration *pendente lite* has been granted jointly to the nominees of the parties litigant.

[*Bond v. Bond* (q). The nominee should be some person indifferent between the parties, who is a housekeeper and a man of substance, and security should be given in double the value of the estate

[*Taylor v. Taylor* (r). Administration to the estate of an intestate contested by two persons, who each claimed to be his widow; administration *pendente lite* granted to the nominee of the one who was living with him at the time of his death, the nominee to lodge the money, as received, in the Bank.

Who pre-
ferred
amongst
Nominees,
and why.

[*Bond v. Bond* (s). Administration contested between a son and an asserted wife; administration *pendente lite* given to the nominee of the son in preference to the nominee of the wife, because his interest was certain, and that of the wife uncertain.

Requisite
Security be-
fore Grant.

[In an administration *pendente lite*, limited to recover certain sums, and granted jointly to the nominees of the two parties in the suit, the court will *not* dispense with such administrators entering into a joint bond (t).

Nature of the
Office of Ad-
ministrator
pendente Lite.

[He is merely an officer of the court, and holds the property only till the suit terminates. As soon as it is concluded he must pay over all that he has received, in his character of administrator, to the persons pronounced by the court entitled; his other functions are then completely at an end, and the court is bound to take care he discharges the duty committed to him as far as the delivery over of every thing to the proper party (u).

His Duties on
the Termina-
tion of Suit.

[As soon as the suit is concluded, he must pay over all that he has received in his character of administrator, to the persons pronounced by the court entitled (x).

[This doctrine was most strongly insisted upon in the recent case of *Godrich v. Jones* (y). In this case, Mr. Jones applied for a grant of administration *pendente lite* of "all and singular the goods, chattels and credits of the deceased;" alleging, in his act on petition, that he had filed a bill in Chancery against the other party, praying an account of the rents and profits of certain leasehold and personal estate of the deceased, of which Godrich had unduly possessed himself, and that a receiver be

(o) [*Young v. Brown*, 1 Hagg. 53.]

(p) [1 Lee's R. 281.]

(q) [Ibid. 354.]

(r) [Ibid. 527.]

(s) [Ibid. 333.]

(t) [*Stanley v. Bernes*, 1 Hagg. 221.]

(u) [*In the goods of Dame Susannah Graves*, 1 Hagg. 315.]

(x) [Ibid. 315.]

(y) [2 Curteis, 453.]

appointed: that the vice-chancellor had appointed a receiver, extended his powers, and granted an injunction restraining the sale of the leaseholds; that the lord chancellor, on appeal (2), had discharged such order, because the ground on which the jurisdiction of the Court of Chancery was originally assumed did not authorize its extension as against persons who claimed adversely the estate of the testatrix; observing, that an administrator *pendente lite*, appointed by the ecclesiastical court, would have, to a certain extent at least, the authority of the court for the purpose of suing and protecting the estate until the ecclesiastical court should decide to whom the probate ought to be granted. The application for an unlimited grant of administration *pendente lite* was rejected, a further act on petition was brought in, containing a prayer for an administration *pendente lite* to be granted to the person who had been appointed receiver by the Court of Chancery, limited for the purpose of appearing as personal representative of the deceased, and of substantiating proceedings in Chancery, or in any cause or suit, concerning various descriptions of property set forth in the act, and alleged to have been improperly obtained from the deceased.

Adminis-
tration *pen-
dente Lite.*

[Sir Herbert Jenner cited the cases of *Northey v. Cock*, *Sutton v. Smith*, *Maskeline* and *Brohier v. Harrison*, to which the reader has been already referred, and rejected the petition of Mr. Jones, observing, he would wish to be informed whether there was any case in which the court had been called upon to make, or had made, such a grant, and where no reasonable ground is stated to show that the property is in any jeopardy; that he could not find any such case, and must be cautious in making a precedent for such a grant, with such limitations, for such a purpose; that he never heard that an administrator *pendente lite* had the power of commencing an action against a party in possession of property which he claims under gift from the deceased, and that he was not inclined to make a precedent, still less in a case where the cause might be heard before the long vacation. He had not any evidence before him that the property was in any special danger, or that it required to be protected by a grant of administration for the investigation of title; he was not prepared to say that the court had this power, though he would not say that it had not the power under peculiar circumstances, but he did not think that in the present case the court was called upon to exercise it.—ED.]

Knight v. Duplessis, Nov. 23, 1749 (a). The heir at law brought a bill to controvert the will, and moved for an injunction to stay the defendant from receiving the personal or the rents and profits of the real estate, and to have a receiver appointed, on the ground that there was a dispute in the ecclesias-

When the
Court of
Chancery
will appoint
a Receiver.

(2) [See below, cases on this subject.]

(a) 1 Ves. 324; [for guardians, see "Form and Manner," p. 112.]

Adminis-
tration *pen-
dente Lite.*

When the
Court of
Chancery
will appoint
a Receiver.

tical court concerning the probate, which not being yet granted, there was none to get in the debts, therefore this court should appoint a receiver; and as to the real estate, the tenants will not pay the rents to any of the contending parties, so that they are in danger of being lost. By Lord Hardwicke: This is a very early motion for a receiver, and no ground for it, nor the least colour as to the personal estate. For if the litigation in the ecclesiastical court is likely to be long, the court has jurisdiction to grant administration *pendente lite*, which administrator may maintain an action to recover the debts, whereby no loss can be to the personal estate. Nor is there any rule, that on a dispute in the ecclesiastical court concerning a probate, this court should appoint a receiver of the personal estate.

In *King v. King (a)*, the Court of Chancery interfered by appointing a receiver. But in a subsequent case, *Richards v. Chave (b)*, the court refused to interfere on the mere ground that two wills were in controversy in the spiritual court, and where no special case was made out, as that the property was in danger and could not be secured by administration *pendente lite*.

[But this case has been overruled by *Watkins v. Brent (c)*, and a series of other cases which seems to have established the doctrine that the Court of Chancery will always look to see whether the whole of such a case is made as justifies the interference of the court, and it may appoint a receiver notwithstanding there be no improper conduct of parties, whenever there be substantially *lis pendens* in the court of probate (*d*).

11. Adminis-
tration
durante
Minority
tate.

[The next subject is the grant of administration *durante minority*. Before 38 Geo. 3, c. 87 (*e*), an administration during the minority of an infant executor ceased at the age of seventeen years, but a distinction was taken in the cases between the minority of the infant executor and infant next of kin. In the latter case, the administration was held to continue in force till the age of twenty-one (*f*).—ED.]

In *Foxwith v. Tremain, H., 21 & 22 Car. 2 (g)*, there were two executors, and one of them was an infant; and whether he must be joined in the action with the other as plaintiff, was the question. It was objected that he must not, because an infant cannot make a warrant of attorney; and if he could, he cannot instruct him. Adjudged, they may both sue by their attorney, because they both represent the person of the tes-

(a) 6 Ves. 172.

(b) 12 Ves. 462 (Lord Erskine).

(c) [1 M. & Cra. 97.]

(d) [See one of the latest cases on this subject, *Marr v. Littlewood*, 2 Myl. & C. 454, (Lord Cottenham). As to the powers of an ad. *pend. lite* at common law and equity, see Mr. V. Wms. on Ex. & Ad. vol. i. 389.]

(e) [Which see below.]

(f) [*Frelee v. Thomas*, 1 Lord Raym. 667; see also 1 Salk. 39; *Atkinson v. Cornish*, Raym. 338; *Carver v. Hasterrigg*, Hob. 251; Comyns, 159; Swinb. 331.]

(g) 1 Mod. 47; 1 Sid. 449; 1 Ventr. 102.

tator, and sue in the right of another, and therefore the infant must be joined with the other.

Where administration is granted during the minority of divers executors, he that comes first of age shall prove the will, and the administration ceaseth (*h*).

So (it was said before 38 Geo. 3, c. 87) if one maketh two executors, one of the age of seventeen, and the other under, administration during the minority of him that is under age is void, because he that is of the age of seventeen may execute the will (*i*).

And it is said, that the ordinary may grant administration during the minority of an infant to whom he pleases; for the next of kin, in respect to administrations, only concerneth the infant, and not the person who is employed for the infant until he comes of age (*j*).

So in the case of *The King v. Bettesworth*, M., 4 Geo. 2(*k*), a mandamus was moved for, to be directed to the judge of the Prerogative Court, to grant administration to one Smith, during the minority of his two infant grandchildren. The judge had approved of him as a proper person, but insisted on his giving security to distribute the effects in equal proportions amongst the creditors. The court were of opinion, that the judge had a discretionary power in granting administration *durante minoritate*, and therefore that in this case he might insist upon reasonable or equitable terms, or otherwise refuse administration to the claimant. But they said, if a mandamus had been moved for, to grant administration generally, they would have granted it.

[It remains to consider the manner in which the ecclesiastical courts have exercised this discretion. The next of kin, whom the court usually appoints *durante minoritate*, is the grandfather (*l*); but where he has been upwards of eighty, and the children have been in the East Indies, the court has appointed an uncle, on his giving full security (*m*). The choice of minors, where the eldest is not fourteen, has not much weight with the court; but it might be otherwise, if he were nearly of age (*n*). And the court pursues in this, as in all other cases of administration, the principle of appointing that person who is most interested in the property, and therefore most likely to dispose of it to advantage (*o*), where there has been an administration *durante minoritate* (*p*).

(*h*) Law of Test. 473, 474.

(*i*) [*Pigot and Gascoigne's case*,] 1 Brownl. 46.

(*j*) *Rex v. Bettesworth*, Fitz.-Gib. 163; S. C. Barnardist. Cha. Ca. 22; [*Briers v. Goddard*, Hob. 250; *Thomas v. Butler*, 219; *West v. Willby*, 3 Phill. 379.]

(*k*) 1 Barnard. 370, 425; [S. C. 2

Stra. 892, by the name of *Smith's case*.]

(*l*) [*In the goods of John Ewing*,] 1 Hagg. 381.]

(*m*) [*Ibid.*]

(*n*) [*West and Smith v. Willby*, 3 Phill. 380.]

(*o*) [*Ibid.*]

(*p*) [*Abbott v. Abbott*, 2 Phill.

578.]

Adminis-
tration
durante
Minoritate.

Where In-
fant is sole
Executor.

12. Admi-
nistration
durante
Corporis
aut Animi
Vitio.

[*In the goods of the Countess Da Cunta (q).* Administration limited to the receipts of dividends in the English funds was granted to a minor, residuary legatee, the wife of a minor, both subjects of and residents in Portugal, on a certificate being produced that by the law of Portugal she was entitled. This grant has been made to testamentary trustees for the use of infant executor and next of kin, until he should arrive at legal age to take probate (*r*); and to creditors, in preference to a grandmother, who had been appointed guardian, and having renounced administration, had prayed to be reappointed before the administration passed the seal (*s*). In all these cases the court requires full justifying security (*t*).—ED.]

By the 38 Geo. 3, c. 87, reciting that whereas inconveniences arise from granting probates to infants under the age of twenty-one, it is enacted, by s. 6, "That where an infant is sole executor, administration, with the will annexed, shall be granted to the guardian of such infant, or to such other person as the spiritual court shall think fit, until such infant shall have attained the full age of twenty-one years, at which period, and not before, probate of the will shall be granted to him."

And by sect. 7, "The person to whom such administration shall be granted, shall have the same powers vested in him as an administrator now hath by virtue of an administration granted to him *durante minore ætate* of the next of kin (*u*)."

[We come now to the consideration of those administrations which are granted *durante corporis aut animi vitio (x)*. The incapacity which occurs in the reported cases as justifying the grant of a temporary power of the ecclesiastical court to grant administration, when the executor became bankrupt, was denied, is that of lunacy (*y*). Where a sole executor or administrator becomes lunatic, it is the ordinary practice of the court to make a limited grant to the committee for his use and benefit during his lunacy. The court of probate will also grant a limited administration to the next of kin, where the person has not been found lunatic by inquisition, upon affidavits stating the fact of the lunacy, and that there has been no inquisition. He takes the precaution, however, of requiring justifying securities to double the amount of the property (*z*).

[Such a grant may also be made to the residuary legatee,

(*q*) [1 Hagg. 237.]

(*r*) [*Hughes v. Richard*, by his guardian, 2 Lee, 543.]

(*s*) [*West and Smith v. Willby*, 3 Phill. 374.]

(*t*) [*In the goods of John Ewing*, 1 Hagg. 381.]

(*u*) [As to the liabilities and rights of an administrator at common law

durante minoritate, see V. Williams on Ex. and Ad. vol. i. p. 378—386.—ED.]

(*x*) [Oughton, Ordo Judic. vol. i. p. 324, n. (2), or tit. 119.]

(*y*) [*Hills v. Mills*, 1 Salk. 35.]

(*z*) [*Ex parte Evelyn*, 2 M. & K. 4, Lord Brougham, *ex relatione* Dr. Lushington.]

where there is the given or implied consent of the committee of the lunatic (a).

Administra-
tion *durante*
Corporis aut
Animi Vitio.

[If an executor, who is also residuary legatee in trust, be incapable, and no committee is appointed, the *cestui que trust* may, under certain circumstances, obtain this grant (b).

[The court has also supplied the defect in the legal representation of a party by reason of the lunacy of one of his administrators. In a case where the lunatic was one of three administrators, and there were certain sums standing in the deceased's name in the Bank of England (c), the court, upon the letters of administration being brought in by the two sane administrators and the committee of the insane one, issued *de novo* letters of administration *de bonis non*, with the consent of the committee, to the two sane administrators (d).

[Administration of the effects of a Jew have been granted to the secretary of the Great Synagogue for the use and benefit of the next of kin (a Jewess), who was of unsound mind, during her lunacy her next of kin having been first cited (e).

[As to other incapacities of executors or administrators to justify this grant. It has been settled since the case of *Hills v. Mills* (f) that the bankruptcy of the executor is not a sufficient cause; and it has been doubted whether a conviction for bigamy will prevent the guilty husband from obtaining a grant of administration to the effects of the second wife (g).—ED.]

Bankruptcy.

If an administrator die, his executors are not administrators, but it behoveth the ordinary to commit a new administration (g).

13. Mis-
cellaneous
Points.

Where administration is granted to two, and one of them dies, the administration surviveth to him who is living (h).

Administra-
tor dying.

[Where there are several executors, the executor of one who has taken out probate, but who is not the *sole* or *surviving* executor, is not entitled to letters of administration to the original testator (i).

[Where a next of kin has delayed for a very long time (thirty-five years) to apply for letters of administration, the court will require an affidavit from a third person as to the *identity* of the applicant, and will order the securities to justify (j).

(a) [In the goods of *Milnes*, 3 907.]

Add. 55. See also *In the goods of Binckes*, 1 Curt. 286.]

(f) [1 Salk. 35.]

(b) [In the goods of *Crump*, 3 152.]
Phill. 497; cf. with *In the goods of Hardstone*, 1 Hagg. 487.]

(g) [Williamson v. Gordon, 2 Add.

(g) 1 Roll. Abr. 907.

(c) [This was before 1 Will. 4, c. 60.]

(h) *Hudson v. Hudson*, T., 1735, Cas. Talb. 127.

(d) [In the goods of the Rev. W. Phillips, 2 Add. 335.]

(i) [In the goods of William Smith, 6 Jurist, 41.]

(e) [In the goods of *Joseph*, 1 Curt.

(j) [5 Jurist, 1017, Practice.]

Miscellaneous
Points.

Refusal of
Administra-
tion.

The person to whom administration is granted, may refuse to take it upon him if he will; for the ordinary hath not power to compel him to accept it (*k*).

[*In the goods of Jane Millar* (*l*). In this case six months had elapsed before the next of kin appeared to take out administration to the deceased. The court said that a creditor, who had, under these circumstances, taken out a decree against the next of kin to accept or refuse administration, was entitled to his costs.—ED.]

Where none
will admin-
ister.

If none of the kindred will take administration, then it shall be granted to those who shall desire it: and if none will take the administration, the ordinary may grant letters *ad colligendum bona defuncti*, and thereby take the goods of the deceased into his own hands, wherewith he is to pay debts and legacies, so far as the goods will reach; for which himself becomes liable in law, as other executors or administrators (*m*).

Administra-
tion granted
to a Person
without di-
rect Interest.

[Where there are neither next of kin nor creditor, the court is free both from the statute law and its own practice, which is its own law (*n*), and may exercise its discretion upon the circumstances of the case. There are instances in which it has granted administration to a person having no direct interest. *In the goods of Keane* (*o*), where a brother and next of kin renounced, it has granted administration to the nephew. *In the goods of Blagrove* (*p*), where a sole next of kin refused to take administration, the court decreed administration to a person who had been her agent, limited “to the collection of all the personal property of the deceased; and giving discharges for all the debts which have been due to the estate, on the payment of the same; and doing what further might be necessary for the preservation of the property aforesaid; and the sole keeping of the same to abide the directions of the court.”

[The foregoing cases were cited *In the goods of Hannah Jane Corbison*, where administration was granted to the son of the sister as her nominee, she being 76, in weak health, and there being a suit pending in Chancery touching the effects; but the court remarked that the grant was by no means a matter of course (*q*). In *Lindsay v. Godmond and others*, the court, under very special circumstances, granted administration to a nominee without *personal* service, according to its usual practice against the next of kin (*r*). But the court will always require justifying security where such personal service is dispensed with (*s*).—ED.]

(*k*) Swin. 384.

(*l*) [Jurist, vol. vi. No. 268.]

(*m*) Swin. 448; [*In the goods of Mary Radnall, Spinster*, 2 Add. 232;] Plowd. 278; Godolph. Orph. Leg. pt. 2, ch. 30, s. 8.

(*n*) [*In the goods of Davies*, 2

Curt. 628.]

(*o*) [1 Hagg. 692.]

(*p*) [2 Hagg. 83.]

(*q*) [5 Jurist, 401.]

(*r*) [5 Jurist, 1137.]

(*s*) [*Belcher v. Maberley*, 2 Curt.

629.]

Where the deceased has no kindred, as when a bastard dies without issue, his personal estate belongs to the king, and his real escheats to the lord. *Vide* title **Bastards**. But the usual course now is for some one to procure a grant of the former from the crown, to whom the ordinary grants letters of administration as of course (*t*).

Miscellaneous Points.

Where there are no Kindred.

[Where a party dies intestate, *without relatives*, the crown must be before the court in some shape or other. It is not enough that the crown declares that it will neither interfere nor consent; there must be either a consent of the crown or such a decree extracted as will bind it (*u*).

Intestate without Relatives.

[In *Aspinwall v. The Queen's Proctor* (*x*), the American consul applied for letters of administration to a citizen of the United States, who had died in this country, limited to his effects and debts here. The case of *Sidy Hamet* (*y*), a native of Fez, who had died at Gibraltar, in which a similar grant had been made, was cited. The crown opposed the motion. The court said, "I am not aware of any case in which it has been held that by the law of this country it is competent to a foreign consul to take possession of the property of a foreigner dying here, *in itinere*, domiciled in his own country. In the case of *Sidy Hamet*, the Emperor of Morocco claimed not the custody of the property but the interest itself; the *jus in re* was in him; and if it could be shown that the property in this case has devolved to the American government, the court would be inclined to grant letters of administration to the consul. But it is only to hold it in trust; and if no claim is made to the property, then the Treasury of the United States would be entitled to take it; and it is not shown that Mr. Hammond died without relations. *Is it then the law and practice of this court* that such an administration should be granted? I apprehend not, and that the crown is the party to see that the property of any person dying in its dominions gets into proper hands."

Foreigner.

[In the goods of *Esther Lamb*. The deceased, the wife of James Lamb, had deposited the sum of 180*l.* in a savings-bank, in her own name, and died in April, 1840, having made a will, whereby she bequeathed the same to a Mrs. Simons, subject to the payment of her debts and funeral expenses, which were defrayed by the legatee. The husband had in 1833 been convicted of felony, and transported to Van Diemen's Land, where he remained. The directors of the savings-bank refused to pay the money, part of which had been deposited before the husband's conviction, to the legatee and

Administration granted to the Legatee of the Wife of a Convict.

(*t*) *Jones v. Goodchild*, 3 P. Wms. 6 Jurist, 41.]
 33; *Manning v. Napp*, 1 Salk. 37. (*x*) [2 Curt. 241.]
 (*u*) [In the goods of *Betsey Gibbs*, (*y*) [1 Add. 340.]

Miscellaneous
Points.

executrix, according to the tenour of the depositor, lest the crown might, under the circumstances, have a claim to the property. The crown, however, made no claim, and the court granted administration with will annexed to the universal legatee and executrix, according to the tenour.—ED.]

May be
granted out
of the Juris-
diction.

Letters of administration are not of necessity to be granted within the limits of the jurisdiction; the granting thereof being not a judicial, but a ministerial, and therefore not a local act; wherein the bishop acts, as a person designed and appointed by the law (a).

Cannot act
before Admin-
istration.

But an administrator cannot act before letters of administration granted to him (b).

But he may bring a bill in chancery; though this would be an exception in action at law (c).

Time of grant-
ing Adminis-
tration.

The practice is, not to issue letters of administration until after the expiration of fourteen days from the death of the intestate; unless for special cause (as that the goods would otherwise perish, or the like) the judge shall think fit to decree them sooner (d).

Fee for Ad-
ministration.

By the statute of the 21 Hen. 8, c. 5, s. 4, "The ordinary shall take nothing for letters of administration, unless the goods of the person deceased amount above the value or sum of 100s.; and in case the goods of the person so deceased amount above the value of 100s., and not above the value or sum of 40l., he shall take only for the same 2s. 6d., and not above."

Here is no provision where the goods exceed the value of 40l.: which seemeth to have been an omission not intended. And (e) a person was indicted because he took 10s. for letters of administration, against the form of the statute; but because the statute makes no provision in case the goods are above 40l. (which was *casus omissus*), and the indictment did not set forth that they were under 40l., and by consequence that the taking more than 2s. 6d. was extortion within the statute; therefore it was adjudged to be ill, inasmuch as without that it could not appear to the court whether he was punishable or not (f).

Other matters relating to the said fees are specified in the former part of this chapter, in treating of the fees for probate of wills (g), and the whole more especially under the title *Fees*, vol. ii. For the fees for probate of wills and administration of the effects of seamen and marines, *vide ante*.

For the amount of stamp duties to be paid on obtaining letters of administration, *vide ante*.

(a) Gibs. 478.

(b) [*Wankford v. Wankford*, 1 Salk. 301.]

(c) Barnardist. 320.

(d) 1 Ought. 323, 324.

(e) 2 Roll. 233; Palm. 318.

(f) Gibs. 485.

(g) *Vide supra*, "Probate."

The plaintiff could not produce any letters of administration; yet to prove himself administrator, he produced the book of the spiritual court, wherein there was an order entered, that administration shall be granted to him; and this was allowed to be good evidence (*h*).

Miscellaneous Points.

Letters of Administration allowed as Evidence.

And by the 4 Ann. c. 16, no advantage or exception shall be taken, for the default of alleging the bringing into court any letters of administration; but the court shall give judgment according to the very right of the cause, without regarding such omissions and defects, except the same shall be specially and particularly set down and shown for cause of demurrer (*i*).

It is common for persons resident in distant foreign settlements to enter into a bond to the directors or committee of the company trading there, conditioned to take possession of the effects of persons dying intestate in their settlements, and to sell the same and remit the produce to the company in Europe, in order that it may be delivered to the lawful administrator; and such a bond has been adjudged good in law (*k*).

Bond to take possession of the Effects of Persons dying intestate abroad.

[It may be as well to mention in this place a mode of proceeding not resorted to frequently or recently, but to which recourse may be still had against any one who has unlawfully possessed himself of the goods of a deceased. The order of proceeding is thus described by Conset (*l*):—

14. Temerary Administration.

[“When one *citra mortem testatoris* gets goods of the deceased into his hands and possession, then do articles properly lie *in causâ temerariæ administrationis*: when he had them *ante mortem testatoris et post mortem detinet*, then the law presumes he had and hath them *ex traditione defuncti dum vixit*; and in that case an action of detinue doth lie: and therefore, if in this last case you sue in a cause of temerary administration, a prohibition will lie; but in your articles use not the word *detinet*, but other words, as *habet, occupat, &c.*; for *detinet* will give ground for a prohibition more than the other.

When and in what case this Action doth lie, and when an Action of Detinue doth lie, and what Words are most fit to use in the Articles given in this Cause.

[“Before these causes of temerary administration are commenced, the executor ought to show to the party who doth temerarily administer the goods of the deceased the will of the deceased, under the seal of the judge who proved it; likewise the lawful administrator ought to show the administration of the deceased's goods, under the seal of the judge who granted it, that so it may appear to the said party that the same goods are lawfully administered: and he must also call upon and request

What things are necessary and preparatory to be done, before this Action be begun, in a Cause of Temerary Administration.

(*h*) *Peasley's case*, 1 Lev. 101; *Elden v. Keddell*, 8 East's R. 187.

(*i*) [*Vide ante*, p. 333, n.]

(*k*) *The African Company v. Torrane*, 6 T. Rep. 588.

(*l*) [Conset's Practice of the Ecclesiastical Courts, pt. 6, ch. 9; see also *Titulus c. xx. of Oughton's Ordo Judiciorum.*]

Temerary Administration.

the said party to be cited, to deliver him the goods of the deceased which are in his custody, to the end that they may be appraised and inventoried, as also that the debts and legacies of the deceased may be paid, and that the same may be administered by the executor or administrator according to the deceased's will, and that the said will may have its effect according to the testator's intention: all this the said executor or administrator must do before witnesses. If any who keeps these goods without lawful authority, being requested on this manner, doth refuse or doth unjustly defer to deliver them, then the party grieved may sue this temerary administrator in a cause of temerary administration of the deceased's goods; or rather he may cite the said party to answer articles touching his soul's health, and especially concerning the impediment of the execution of the deceased's will, and the temerary administration of the deceased's goods, to be objected at the promotion of the said executor or administrator.

The Tenor of the Sentence in this Cause.

[“The tenor of the sentence in these cases of temerary administration of the goods ought to be such or the like as follows; viz. that such an one is executor or administrator of the goods of N. deceased, and that all the goods of the said deceased do fall under the said administration to pay the deceased's debts and legacies, and that such an one, *scil.* the defendant, doth keep some goods of the deceased's (*m*), especially such and such [*here specify those goods which are proved to be administered by the defendant, whether by witnesses or by the confession of the adverse party*] are temerarily administered, by reason whereof the executor or administrator hath been and is so hindered as that he cannot administer the said goods, and make an inventory of the same, and pay the debts and legacies (if it be the executor who sues in this cause) of the said deceased, and prove the will, &c.; and the said N., that is, the defendant, is to be pronounced to have incurred the sentence of excommunication (*n*) pronounced against these persons, and that he is a person who is excommunicate ipso facto, and as such is to be denounced publicly, and is to be condemned in charges. But here it is to be noted, that the aforesaid sentence pronounced in manner and form aforesaid, and the same being verbally executed, the judge is not wont to decree a monition against this temerary administrator for the payment or delivery of the said goods temerarily administered, but publication or denunciation being made of the said sentence of excommunication pronounced by law, in the aforesaid case, in the parish church of

(*m*) [“In petitione hæreditatis actor non tenetur probare defunctum habuisse dominium illius rei, tempore mortis, sed satis erit, rem illam in ejus hæreditate mansisse. ff. de pet.

hæred. Cavar. pr. q. 12. n. 2, sect. erit. quidem.”]

(*n*) [“Lind. de testam. c. statutum verb. cæder. contingit.” See the writ *de contumace capiendo*, and the pro-

the temerary administrator. And if the defendant doth persist in this sentence of excommunication forty days together after the same is denounced, he is to be signified to the king's majesty, and is to be imprisoned upon the writ de excommunicato capiendo, and is not to be absolved (o) until he restore those goods which he temerarily hath administered, and satisfied the Church for his contempt and pertinacious contumacy; yet the judge may proceed to execution of the sentence, as to the charges, like as in other ecclesiastical causes."—ED.]

Temerary Administration.

The oath to be made by the administrator, on his taking out letters of administration, is usually in this form :

15. Administrator's Oath; and

"You shall swear, that you believe A. B., deceased, died without a will; and that you will well and truly administer all and every the goods of the said deceased, and pay his debts so far as his goods will extend; and that you will exhibit a true, full, and perfect inventory of the said goods of the deceased, and render a true account of your administration into the ——— court of C., when you shall be thereunto lawfully required: So help you God (p)."

By the statute of the 21 Hen. 8, c. 5, s. 3, "In case any person die intestate, or the executors named in any testament refuse to prove the said testament, then the ordinary or other person having authority to take probate of testaments, shall grant the administration of the goods of the testator or person deceased; taking surety of him or them to whom shall be made such commission, for the true administration of the goods, chattels and debts, which he or they shall be so authorized to administer."

Bond on granting Administration (q).

And by the statute of the 22 & 23 Car. 2, c. 10, "All ordinaries, as well the judges of the Prerogative Courts of Canterbury and York, as all other ordinaries and ecclesiastical judges, and every of them, having power to commit administration of the goods of persons dying intestate, shall and may upon their granting and committing of administrations of the goods of persons dying intestate, of the person or persons to whom any administration is to be committed, take sufficient bond with two or more able sureties, respect being had to the value of the estate, in the name of the ordinary, with the condition in form and manner following, *mutatis mutandis*, viz.

"The condition of this obligation is such, that if the within bounden A. B., administrator of all and singular the goods, chattels, and credits of C. D, deceased, do make or cause to be made a true and perfect in-

ceedings now substituted for the process of excommunication, under title **Excommunication**, vol. ii., and **Practice**, vol. iii.]

(o) ["Si absolut. fuerit valet absolutio non vocato actore, sed actori

appellandum est. Specul. de contuma. Sect. nunc dicem. 4, n. 12; Boversing. verb. Absolutio, n. 1, p. 367."]

(p) 1 Ought. 323, 324.

(q) *Vide infra*, "Account."

Administration
Bond.

ventory of all and singular the goods, chattels, and credits of the said deceased, which have or shall come to the hands, possession, or knowledge of him the said A. B., or into the hands and possession of any other person or persons for him, and the same so made do exhibit or cause to be exhibited into the registry of — court, at or before the — day of — next ensuing; and the same goods, chattels, and credits, and all other the goods, chattels, and credits of the said deceased at the time of his death, which at any time after shall come to the hands or possession of the said A. B., or into the hands and possession of any other person or persons for him, do well and truly administer according to law; and further do make or cause to be made a true and just account of his said administration, at or before the — day of —; and all the rest and residue of the said goods, chattels, and credits which shall be found remaining upon the said administrator's account, the same being first examined and allowed of by the judge or judges for the time being of the said court, shall deliver and pay unto such person or persons respectively, as the said judge or judges, by his or their decree or sentence, pursuant to the true intent and meaning of this act, shall limit and appoint; and if it shall hereafter appear that any last will and testament was made by the said deceased, and the executor or executors therein named do exhibit the same into the said court, making request to have it allowed and approved accordingly, if the said A. B. within bounden being thereunto required do render and deliver the said letters of administration (approbation of such testament being first had and made) in the said court, then this obligation to be void and of none effect, or else to remain in full force and virtue."

Sects. 1, 2, 3. "Which bonds shall be good to all intents and purposes, and pleadable in any courts of justice."

H., 6 Anne, *Archbishop of Canterbury v. Willis*(r). The condition of the bond, as to administering truly according to law, is to be intended in bringing in his account, and not in paying the debts of the intestate; and therefore a creditor shall not take an assignment of the bond, and sue it, and for breach assign non-payment of a debt to him, or a *devastavit* committed by the administrator, for that would be endless.

Greenside
v.
Benson.

June 28, 1745, *Greenside and others v. Benson and others*(s). The plaintiffs were two sureties with the defendant Mrs. Hudson in an administration bond given to the commissary of York, for her bringing in a true and perfect inventory of the intestate's effects. The defendant Mrs. Hudson did afterwards exhibit an inventory in the Spiritual Court of York. The defendant Benson, being a creditor of the intestate by bond in the penalty of 600*l.*, brought an action against the defendant Mrs. Hudson upon that bond, and she pleaded that she had not assets above 54*l.*, which she paid into court. The defendant Benson, not being satisfied with the inventory brought in by her, procured the commissary (by indemnifying him) to assign the administration bond to him, and he put it in suit by bringing three

(r) 1 Salk. 316.

(s) 3 Atk. 248.

several actions, one against her, and one against each of the sureties; and assigned for breach of the bond, that she had not exhibited a true and perfect inventory. These causes came on to be tried, and on the trial no defence was made, and there was judgment for the plaintiff by default. A bill was brought against the defendant Benson, insisting that he as a creditor had no right to put the bond in suit against the sureties, and prayed an injunction to stay the proceedings at law. And for this was cited the case of the *Archbishop of Canterbury v. Willis*. By the Lord Chancellor Hardwicke: "There is no doubt but the archbishop's commissary may assign a breach in not delivering a true and perfect inventory, and even without citation, and nothing else appears at law, and there must have been a judgment for the ordinary, because no doubt there was a breach in not exhibiting such an inventory. What the counsel for the plaintiffs and for Mrs. Hudson aim at would have been right, supposing the commissary had assigned for breach the non-payment of the creditor's debts. The ecclesiastical court understand no more by an account, than some account in nature of an inventory, and depends only upon the particular wording of inventories by administrators. The ordinary, after an administrator has exhibited an inventory, cannot compel the administrator to account, but it must be at the instance of the party, and therefore the inventory and account are as to the ordinary the same thing. What the defendant Mr. Benson asks is, that this bond upon which the penalty is recovered may stand only as a security for what is justly due to the creditor. The administratrix to be sure cannot now dispute the verdict, which finds she did not administer the whole assets, and she is bound by a verdict which has unravelled a matter, and it is no excuse to say that the verdict was without defence of the administratrix, for that is rather a consciousness that she had no defence. Therefore the court will not think it proper to have the whole account taken over again, or to alter what has been found by the verdict. The case of the sureties is not at all better; for as the verdict was obtained against the administratrix, who was the proper person to try it, it would be hard to have this tried over again, in as many actions as the plaintiffs please." His lordship ordered an account to be taken only of what was exhibited upon the inventory, and the verdict to stand as a security for so much as that should fall short to satisfy the defendant's principal and interest on his bond.

T., 13 Geo. 2, *Folkes v. Docminique* (t). The plaintiff declares on bond in the *detinet*, against the defendant as administrator during minority with the will annexed. And upon oyer,

Folkes
v.
Docminique.

Administra-
tion Bond.

the condition appears to be, for exhibiting an inventory, and duly administering by paying debts and legacies. The performance of all which the defendant avers. The plaintiff replies, that he had not paid a legacy of 1500*l.*, though he had more than sufficient to pay all the debts, to wit, 500*l.* And on demurrer it was objected, that this was a void bond, not warranted by the statute of the 21 Hen. 8, c. 5, (nor by the statute of the 22 & 23 Car. 2, c. 10, for neither of those statutes extendeth to administrators during the minority of an executor,) nor yet by the common law; for that it requireth the administrator to pay legacies according to the ecclesiastical decision, and shall be taken to be obtained by coercion. On the contrary it was argued, that this not being on an intestacy (nor in case where an executor refuseth) is not within the statutes it is true; but it is to be supported as a reasonable bond taken by the course of the ecclesiastical court. And though formerly it was disputed, yet it is now settled that they may compel distribution: that here the breach is assigned in non-payment of legacies, of which they have undoubted jurisdiction: and if it be good in any part (being a bond at common law), it is enough. And it differs from the case, where part of the condition is against a statute, for there it is void *in toto*. And by the court: "These administrations are not within the statutes, and therefore we deny a mandamus; we must therefore consider it as a bond at common law; and then it is sufficient if it be good in that part on which the breach is assigned, as we think this is; and we cannot take it to be a bond by coercion. Therefore the plaintiff must have judgment."

Archbishop of
Canterbury
v.
House.

T., 14 Geo. 3, *Archbishop of Canterbury v. House*(u). Upon a rule to show cause why the proceedings in an action upon an administration bond sued in the name of the archbishop shall not be stayed, with costs to be paid by the assignee of the archbishop; the grounds for staying the proceedings were—1. That in fact the assignee, who was a *creditor* only, had no authority from the archbishop; 2. That it was not competent to the archbishop to depute such authority to a creditor. The counsel who showed cause cited *Greenside v. Benson* (x) as a case in point, that a creditor has a right to sue upon the administration bond. And with respect to the first point, it appeared clearly upon the affidavits, that the archbishop had given an authority to the plaintiff to sue in his name, and that the attorney for the defendant was fully apprised of it; though upon a personal application by the defendant's attorney, to know if such authority was granted, the secretary of the archbishop at first informed him that it had been refused, because Dr. Ducarel had advised the archbishop that it could not be

(u) Cowper, 140.

(x) 3 Atk. 248.

granted to a creditor. Lord Mansfield: "No next of kin ever struggled for the administration of an insolvent estate with an honest view. What the object of the administratrix was in this case is very manifest upon the affidavits that have been read; namely, to sell the administration to the creditors. But failing of that purpose, after having obtained the administration, she makes use of all sort of chicane, delay, and false pleas, to defeat the creditors, and at length absconds. This is the general state of the case. At last a creditor or creditors have brought an action upon the administration bond in the name of the archbishop, and this is an application on the part of the administratrix to stay the proceedings in the name of the archbishop with costs, on two grounds: first, that it is not competent to the archbishop to authorize a creditor to put the bond in suit, but only the next of kin; secondly, that the archbishop in his private capacity has not deputed such authority to the present plaintiff. With respect to the first point, let us see what it is which the act requires the archbishop or his ordinary to do: He is to grant administration, and to take bonds with condition that the administrators shall duly administer the intestate's effects: that they shall give an account of such their administration, and make an inventory of the goods and chattels, and that they shall pay the surplus to the next of kin. Now it is agreed, that if the next of kin is desirous of suing upon this bond, the court will direct the ordinary to permit his name to be used, because the next of kin is interested in the surplus. In like manner, if such application is made by a creditor, I see no reason why he should not have the same privilege: and I know of no authority which says that the ordinary cannot empower him to put the bond in suit. On the contrary, it is *ex debito justitiæ* that he ought to do so; for though a creditor has no concern in the latter part of the condition, namely, the distribution of the surplus among the next of kin, yet he is most materially and principally interested in the administrator's delivering in a true inventory, and in the due administration of the effects. To one who has a *right*, it is *ex debito justitiæ* to grant the liberty of suing in the archbishop's name; to one who has no *right*, it is *ex debito justitiæ* to refuse it. As to the objection, that it is liable to be abused: if any bad use were made of it, the court would no doubt set aside the proceedings. But in the present case, there is no pretence or even suggestion of any abuse. And therefore I am clearly of opinion that the plaintiff is well entitled to put the bond in suit. The next ground is, that the archbishop in his private person gave no such authority to the present plaintiff. I think a personal application to the archbishop was very improper; for it is not his personal affair; his name is used *officially* only; and therefore I am not surprised that the archbishop should not recollect what was requisite

upon the occasion. He might refer it to Dr. Ducarel; and if Dr. Ducarel gave the answer that is stated, he was ill advised. If the case rested there, and the attorney had been misled by that answer, it would have operated differently as to the costs. But it is in evidence that he had the fullest information afterwards that the archbishop had authorized the plaintiff to sue in his name. And therefore I am of opinion that the rule should be discharged with costs, to be paid by the attorney for the defendant." The other three judges concurred.

[The authority of this case was said by Sir H. Jenner (y) to be somewhat shaken by the case of *Thomas v. The Archbishop of Canterbury* (z), decided in 1787 by Lord Thurlow. In this case an administratrix entered into the usual bond in the Prerogative Court to exhibit an inventory within a limited time; the time having elapsed without an inventory being exhibited, a creditor put the bond in suit in the name of the archbishop. The administratrix filed her bill for an injunction, which was granted on the terms of her giving judgment in the action, which was to stand as a security for the costs at law and in equity, (but not for the debt), and amending the bill by submitting to account. The impression of Lord Thurlow clearly was, that the spiritual court had a discretion in this matter, and that it would not permit the action to be brought if the executor could show that he was not culpable. Sir H. Jenner observed that he did not know any case in which a *mandamus* has been granted from the Court of Queen's Bench. Every case on this point is discussed in *Archbishop of Canterbury v. Robertson* (a), in which case the bond had been attended with, and nominal damages recovered as to the non-delivery of an inventory. Mr. Baron Bayley in that case seemed to be of opinion that the ecclesiastical court might limit the breaches to be assigned. In a recent case an attempt was made to put the bond in suit without having obtained any order from the ecclesiastical court, but Tindal, C. J., refused to decide on a point of common law practice on a most important right of the ecclesiastical court, observing, that the proper way would be to proceed by *mandamus* (b).

[It seems clear, from the case of *Crowley, &c. v. Chipp, &c.* (c), that the present learned judge of the Prerogative Court does not consider that it is *ex debito justitiæ* to permit the bond to be attended with for the purpose of being put in suit. In this case the administratrix had not brought in an inventory within time assigned her by the bond, but no proceedings had been instituted against her, and the judge expressing great unwillingness under any circumstances to allow the bond to

(y) [*Crowley and Sharman v. Chipp* 3 Tyr. 390.]
and *Tubb*, 1 Curteis, 459.]

(z) [1 Cox, 399.]

(a) [1 Crom. & Mees. 390; S. C.]

(b) [*Archbishop of Canterbury v. Tubb*, 3 Bing. N. C. 789.]

(c) [1 Curt. 458, cited below.]

be attended with upon the mere non-delivery (*d*) of an inventory, refused to make any order till the parties cited the administratrix to bring in an inventory. The administratrix did afterwards bring one in, and then the court dismissed the parties, but without costs. In the latest case on this subject, A. and B. having appointed C. their attorney for the purpose of taking administration with the will annexed of D. for their use and benefit, and C. having taken administration, and entered into the usual bond with two sureties, the court refused to permit the bond to be attended with for the purpose of being put in suit against the sureties by A. and B., they *never having called for an inventory and account from C., and having given him three years to pay the balance which was due to them under the administration, and he having in the meantime died insolvent* (*e*).

Administration Bond.

[*In the goods of Joseph Hall* (*f*). An action at common law being brought in the archbishop's name by the administrator *de bonis non* against the executors of the original administrator for the balance of the intestate's effects, the court directed the bond given by the original administrator to be attended, but required the archbishop to be indemnified against costs, as the action was brought in his name.

Administration de Bonis non.

[*Stanley v. Bernes*. In an administration *pendente lite* limited to recover certain sums, and granted jointly to the nominees of the two parties in the suit, the court will not dispense with such administrator's entering into a joint bond (*g*).

Administration durante Lite.

[*Abbott v. Abbott*. Where there has been an administration *durante minore ætate*, and the minor, becoming a major, takes upon himself the administration, he must give security to the same amount that the former administrator did (*h*).

Administration durante Minoritate.

[If administration be granted to a person out of England, the court requires that the sureties to the bond shall be resident within the kingdom (*i*).

To a Foreigner.

[The opinion of Sir George Lee (*k*), that a creditor had nothing to do with an administration bond, and had no interest in it, seems at variance with that of Lord Lyndhurst (*l*), who appears to consider it as an established point, that a creditor *ex debito justitiæ* may, as well as the next of kin, sue upon the administration bond in the name of the ordinary;

Creditor.

(*d*) [Though this was a breach of the bond according to the courts of common law, *Crowley v. Chipp*, 1 Curt. 462; and *vide supra*, *Greenside v. Benson*, 3 Atk. 252; *Archbishop of Canterbury v. Robertson*, 1 Cr. & M. 690; S. C. 3 Tyr. 390.]

(*e*) [*Murray and Maling v. M'Inerheny and Impey*, 1 Curt. 576, 580.]

(*f*) [1 Hagg. 139.]

(*g*) [1 Hagg. 221.]

(*h*) [2 Phill. 578.]

(*i*) [*In the goods of O'Byrne*, 1 Hagg. 316; *Cambiaso v. Negrotto*, 2 Add. 439.]

(*k*) [*Hughes v. Cook*, 1 Lee, 386; *Hackman v. Black*, 2 Lee, 251; see also *Wallis v. Pison*, Ambler, 183; *Ashley v. Baillie*, 2 Ves. sen. 368.]

(*l*) [*Archbishop of Canterbury v. Robertson*, 1 Cr. & Mees. 711; S. C. Tyr. 417.]

Administra-
tion Bond.

but if creditors may sue on the bond where the inventory has not been delivered, certainly they may not do so, assigning for breach the non-payment of their debt, or even suggesting a *devastavit* (l).

Court of Pro-
bate will not
pronounce
Bond for-
feited.

[It must be remembered that the bond cannot be put in suit, nor the payment of it enforced, in the court of probate; its practice therefore is, not to pronounce under any circumstances the bond to be forfeited, but under certain circumstances to order the bond to be attended with in aid of justice in another court (m). The mode of application to the court of probate to allow the bond to be put in suit, is laid down by Sir J. Nicholl in *Younge v. Skelton* (n), which will be discussed below under the title *Inventory*.

Justifying
Securities.

[It has been said that the court may call according to its discretion, exercised upon the circumstances (o) of each case, for *justifying securities* to the bond for administration; but there is one general rule, to which it rarely if ever allows an exception, viz. to require the securities to justify where there is not a personal service of the decree on the parties having a prior claim to the grant.

[It should be also observed that where, in the ordinary course of practice, securities would be called upon to justify, very special circumstances must be stated to the court before it allows a departure from its rules (p). The court generally feels bound to comply with the request of the next of kin, that the securities should be ordered to justify, though it may be enough that they do so to the amount of the share of the party excluded from the grant of administration (q).

What is to
justify.

[A security is said to justify when the party tendering the security swears that he is *now* worth the sum for which he is bound after all his just debts are paid (r).—ED.]

16. Revo-
cation of
Adminis-
tration.

The ordinary cannot repeal an administration at his pleasure (s).

H., 15 & 16 Car. 2, *Sands' case* (t). Sir George Sands

(l) [*Archbishop of Canterbury v. Robertson*, 1 Cr. & Mees. 711; S. C. Tyr. 417.]

(m) [*Younge v. Shelton*, 3 Hagg. 688.]

(n) [*Ibid.*]

(o) [*Aitkin v. Ford*, 3 Hagg. 194, n. (a).]

(p) [*Howell v. Metcalfe*, 2 Add. 348.]

(q) [*Coppin v. Dillon*, 4 Hagg. 376.]

(r) [See also *Taylor v. Diplock*, 2 Phill. 280, next of kin administrator cum test. annexo—*Friswell v. Moore*, 3 Phill. 139; *In the goods of Hardstone*, 1 Hagg. 487; *of Williams*, 3 Hagg. 217, residuary legatee—*Pick-*

ering v. Pickering, 1 Hagg. 480, legatee—*Ex parte Evelyn*, 2 Myl. & K. 4, practice as to temporary administrator, for lunacy—court requires sureties to double the amount, and justifying securities. *Vide supra*, and *Howell v. Metcalfe*, 2 Add. 350; *In the goods of Campbell*, 2 Hagg. 555. The court objects to separate bond, *Howell v. Metcalfe*, 2 Add. 350; *Stanley v. Bernes*, 1 Hagg. 221. See also generally on the subject, *Bond v. Bond*, 1 Lee, 429; *Allen v. Allen*, 2 Lee, 244.—ED.]

(s) Swin. 381 a.

(t) Raym. 93.

administered to his son, and afterwards a woman, pretending to be his wife, sued for a repeal; but a prohibition was granted, because the ordinary had an election to grant it either to the father or wife, and had executed his power by granting it to the father.

But where a *feme covert* died intestate, and the next of kin to her obtained administration, and the husband sued for a repeal, a prohibition was denied; because in this case the ordinary had no power or election, to grant it to any person but to the husband (*u*).

And the rule seemeth to be, that an administration may be repealed, although not arbitrarily; yet where there shall be just cause for so doing, of which the temporal courts are to judge, as if the administrator should become lunatic, or the like. So if the next of kin, at the time of the death of the intestate, happen to be incapable of administering, by reason of attain or excommunication (*v*), and the ordinary commits it to another; if he afterwards becomes capable, the ordinary may repeal the first administration, and commit it to the next of kin (*w*).

And the same thing is much more to be said, where the administration was undue *ab initio*, whether as granted to other than the next of kin, or granted by an incompetent authority, or in an irregular manner, without citing those who ought to have been cited (*x*).

T., 5 Geo. 2, *Harrison v. Weldon* (*y*). Walker Weldon died intestate, leaving Anne, his wife, and Amphillis, his sister. The sister upon the common oath, that she believed he died intestate without wife or children, obtained administration. And in a suit to repeal it as obtained by surprise, it appeared to be the course of the court never to grant it to the next of kin, until the wife is cited. The sister moved for a prohibition, and insisted that the ordinary had executed his authority. But the court held, that the ordinary could not be said to have executed his authority, having never had an opportunity to make the election which the statute of the 21 Hen. 8, c. 5, gives him; that it was incident to every court, to rectify mistakes they were led into by the misrepresentation of the parties; that if there were no surprise (of which the court below was judge) there ought to be a prohibition, because then the administration will have been duly and regularly granted: but here was a plain surprise, and therefore they denied a prohibition.

And it is said, that an administration may be repealed, with-

(*u*) 3 Salk. 22.

(*v*) [All civil penalties attaching to excommunication are taken away by 53 Geo. 3, c. 127. See title ~~Ex-~~

communication.]

(*w*) Gibs. 479.

(*x*) Gibs. 479; 2 Bac. Abr. 410.

(*y*) Str. 911.

Revocation.

out any sentence of revocation to be given in any spiritual court or otherwise; as by a granting a new administration (z).

[However, the established practice is, to call in and revoke the first before the second grant is issued (a). It is clear, then, that, on just ground, letters of administration may be called in; and it remains to consider what have been considered just grounds of revocation by the courts of probate.

Where Legatee will not be allowed to call in.

[In *Wood v. Medley* (b), two papers having been propounded by an executor in an allegation which was rejected, and administration thereupon taken out by the next of kin: on a legatee, under one of those papers, calling in the administration, and the administrator appearing under protest, the protest was allowed to stand over in order that the legatee, on showing he was not cognizant of the former proceedings, might bring in an allegation—the appointment of the executor being in one paper, the interest of the legatee entirely under the other, and the two papers not being necessarily connected. But the legatee's allegation to be admissible, must show by affidavit that facts have come to his knowledge since the rejection of the former allegation; in which case it should seem the executor might repropound them.

What his Allegation must show to be admissible.

Where next of Kin may call in.

[In *Loton v. Loton* (c), a diocesan administration, obtained by one next of kin, was directed to be brought in, and pronounced null and void on the prayer of the next of kin, who had taken out a prerogative administration—the diocesan administrator being personally cited, and showing no cause to the contrary.

A limited Administration called in.

[In *Harris and Wiggins v. Milburn* (d) an administration (limited to see proceedings in Chancery), which was decreed on the next of kin being cited and after due inquiries for a will, and was called in by the executors of a will not produced till long after directed to be redelivered out; and the executors, who might have taken an *et cæterorum* probate, condemned in costs. Original papers brought into the Registry by A., in a suit between A. and B., as to the will of C., cannot be delivered out to D. on an affidavit of D.'s attorney; that D., as heir at law of C., was in possession of certain premises, and that these papers were muniments of the title thereto (e). Administration once granted, may be retracted before the administration has passed the seal (f).

Original Papers cannot be delivered out.

Renunciation of, when revocable.

(z) 1 And. 303; Law of Test. 476; *testes* in solemn form; *vide supra*.

[but see *Pratt v. Stocke*, Cro. Eliz. 315; Toller, 126.]

(b) [1 Hagg. 645.]

(c) [1 Hagg. 683.]

(a) [Toller, 126, 75; *Rains v. Commissary of Canterbury*, 7 Mod.

(d) [2 Hagg. 62.]

146. It has been seen above that the probate, if proved in *common form*, may be called in, and the party propounding it compelled to prove *per*

(e) [*In the goods of George Hulmes*, 2 Hagg. 82.]

(f) [*West and Smith v. Willby*, 3 Phill. 379.]

[*In the goods of Jenkins (g)*. An administration granted to a creditor, who, having settled his own debt, had gone away, was revoked. But a grant made to one creditor shall not be revoked for one to a larger amount, who appears subsequently (*h*); nor generally, when made to a younger for an elder brother (*i*); nor when made to a niece for a nephew (*j*); nor where two have equal right, shall it be rejected for one (*k*); nor for omission to bring in an inventory (*l*); nor always on account of abuse (*m*).

Revocation.
from Cre-
ditor.

Generally for
what not re-
vocable.

[*In Phillips v. Alcock (n)*, a husband obtained administration to his wife as dead intestate. Two wills were afterwards produced. The court refused to revoke the administration till one of the wills was proved to be good in law. But letters of administration have been revoked for want of jurisdiction (*o*), by reason of a will subsequently found (*p*); of fraud (*q*); of having been surreptitiously obtained (*r*); of an erroneous grant to the lesser and more remote interest (*s*).

Generally for
what revo-
cable.

[The attornies of an executrix, having withdrawn from the suit after propounding an alleged will, and suffered a next of kin to take administration, were held under the circumstances not to bar that executrix from calling upon the next of kin to bring in the administration and repropounding the alleged will (*t*). But in ordinary cases, where the parties, being present, declare they proceed no further, or duly authorize a proctor to take that step for them, the court, as far as it legally can, will hold them bound (*u*).

Conduct of
Executor's
Attorney
where no
Bar.

[A person in possession of an interest is not bound to propound his interest till the party calling in question the grant has first propounded and proved his (*v*). A person in possession of an administration may, under circumstances, be obliged to proceed *pari passu*. There may be special circumstances where the privilege would not attach; but public inconvenience would be great, if parties were liable to be called upon at any period to propound their interest by those who may have no interest whatever in the effects. If the administrator denies the interest, he does it at some peril of costs; he may also do it at some inconvenience to himself, that of delay; for if the

Interest how
and when to
be pro-
pounded.

(*g*) [3 Phill. 33.]

(*h*) [Dubois v. Trant, 12 Mod. 438.]

(*i*) [Aylyff v. Aylyff, 2 Keb. 812.]

(*j*) [Hill v. Bird, Sty. 102.]

(*k*) [Taylor v. Shore, T. Jones, 161.]

(*l*) [Hill v. Bird, Sty. 102.]

(*m*) [Thomas v. Butler, 1 Vent. 219.]

(*n*) [2 Lee, 97.]

(*o*) [Burrell v. Eastlow, 1 Lee, 159.]

(*p*) [Carolus v. Lynch, 1 Lee, 169; Baker v. Russell, 1 Lee, 167.]

(*q*) [Drummond v. Hamilton, 1 Lee, 357; Smith v. Corry, ibid. 418; Cornish v. Cornish, ibid. 14.]

(*r*) [Lord Trimlestown v. Lady Trimlestown, 3 Hagg. 243.]

(*s*) [Burgis by his guardian v. Burgis, 1 Lee, 121; Pringle v. Brown, ibid. 123; Trower and Smedley v. Cox, 1 Add. 219.]

(*t*) [1 Add. 219.]

(*u*) [Ibid.]

(*v*) [Dabbs v. Chisman and Jenners v. Beauchamp, 1 Phill. 155; Hibben v. Calemberg, 1 Phill. 166.]

adverse interest should be established, he will be liable to be put on the proof of his own, after considerable loss of time; for it cannot be maintained, that possession of an administration obtained, without others being parties, either actually or virtually, to the grant, can conclude those parties. Indeed, this is admitted, by putting the other party upon proof of his interest (z).—ED.]

VI. *Of the Duty of Executors and Administrators in making an Inventory, and getting in the Effects of the Deceased* [Vide infra, "Account."]

Administer-
ing before
Inventory
made.

[According to the old practice of the Prerogative Court of Canterbury, an inventory was required to be exhibited before probate; but this has fallen into desuetude, and the court will not now call for one *ex officio* (a), except at the instance of a party having a probable or contingent interest in the property (b).—ED.]

At the time of probate or administration granted, it is required that the executor or administrator produce an inventory of the goods, chattels, and credits of the deceased; and at the same time he maketh oath that he will exhibit such (further) inventory into the court as he shall thereafter be lawfully required to do.

[It is a matter of duty in the executor or administrator to deliver an account and inventory when properly called upon for that purpose; and in order to exonerate himself from liability, it is always most prudent to exhibit it before a final settlement (c). An administrator *pendente lite* is bound to exhibit an account or inventory (d).—ED.]

And it is said that if an executor, without making an inventory, shall intermeddle himself with the administration of the goods of the deceased (except in certain cases, as for the expenses of the funeral, for insinuation of the testament, for making the inventory, for the necessary preservation of the goods) shall be bound to answer to every one of the *creditors* his whole debt (e).

Also it is said, that every *legatary* may recover his whole legacy at his hands; for in this case the law presumeth that there are sufficient goods to pay all the legacies, and that the executor doth secretly and fraudulently subtract the same. Whereas otherwise the executor is presumed not to have any

(z) [*Dabbs v. Chapman*, 1 Phill. 164, Sir J. Nicholl.] cited.—ED.]

(a) [Though it may do so, *Phillips v. Bignell*, 1 Phill. 140; *In the goods of Williams*, 3 Hagg. 217.]

(b) [See below, *Phillips v. Bignell*, 1 Phill. 239, and the cases there

(c) [*Kenny v. Jackson*, 1 Hagg. 106; *Hockman v. Black*, 2 Lee, 252.]

(d) [*Brotherton v. Hellier*, 2 Lee,

(e) Swin. 228, 229; Athon, 107.]

more goods which were the testator's than are described in the inventory, the same being lawfully made (*f*).

And therefore if any creditor or legatary doth affirm that the testator had any more goods than are comprised in the inventory, he must prove the same, otherwise the judge is to give credit to the inventory being made in due form of law (*g*).

And such executor is also further punishable at the discretion of the ordinary by the constitution here next following; and therefore it concerneth the executor that he do not administer the goods of the deceased until he hath caused an inventory to be made; for howsoever the act of him that is named executor is said to hold in law, before the proving of the will and the making of the inventory, nevertheless he that so presumeth to meddle and administer as executor before he maketh an inventory, is subject to ecclesiastical punishment, unless it be for doing such things as cannot be deferred till the inventory be made; as for intermeddling about the funeral, or disposing of such things as cannot be preserved by keeping, or such like (*h*).

By a constitution of Othobon (*i*), "The executors of testaments, before they shall intermeddle with the administration of the goods, shall make an inventory in the presence of some credible persons who shall competently understand the value of the deceased's goods; and the same shall exhibit unto the ordinary; and if any shall presume to administer without such inventory made, he shall be punished by the discretion of his ordinary."

Laws requiring the making an Inventory.

And by a constitution of Archbishop Stratford (*k*) it is ordered as follows: "We do enjoin that no executor of any testament shall be permitted to administer of the testator's goods, unless he first make a faithful inventory of the said goods; the funeral expenses, and the expenses about the inventory, only excepted. And the same inventory shall be delivered to the ordinary within a time to be appointed by his discretion."

And by the statute of the 21 Hen. 8, c. 5, s. 4, "The executor and executors named by the testator or person deceased, or such other person or persons to whom administration shall be committed where any person dieth intestate, or by way of intestate, calling or taking to him or them such person or persons, two at the least, to whom the person so dying was indebted, or made any legacy; and upon their refusal or absence, two other honest persons, being next of kin to the person so dying; and in their default and absence, two other honest persons; and in their presence, and by their discretions, shall make or cause to be made a true and perfect inventory

(*f*) Swin. 228, 229; Toth. 183;
12 Mod. 346.

(*g*) Swin. 426.

(*h*) Swin. 424.

(*i*) Athon, 107.

(*k*) Lind. 176.

of all the goods, chattels, wares, merchandizes, as well moveable as not moveable whatsoever, that were of the said person so deceased: and the same shall cause to be indented, whereof the one part shall be by the said executor or executors, administrator or administrators, upon his or their oath or oaths, to be taken before the said bishops or ordinaries, their officials or commissaries, or other persons having power to take probate of the testaments, to be good and true, delivered into the keeping of the said bishop, ordinary, or other person as aforesaid; and the other part thereof to remain with the said executor or executors, administrator or administrators. And no bishop, ordinary, or other whatsoever person, having authority to take probate of testaments, on pain in this statute contained, shall refuse to take such inventory to him presented or tendered to be delivered as aforesaid."

Swinburne says (l), if the executor enter to the testator's goods, and will make no inventory thereof, then may every legatary recover his whole legacy at his hands; for in this case the law presumeth that there are sufficient goods to pay all the legacies, and that the executor doth secretly and fraudulently subtract the same; whereas otherwise the executor is presumed not to have any more goods which were the testator's than are described in the inventory, the same being lawfully made.

Neglect of making Inventory re-proved by the Temporal Courts.

In the case of *The Corporation of Clergymen's Sons v. Swainson*, Mar. 5, 1747 (m), where the executors made no inventory, but paid interest for a legacy during their lives, it was decreed by the Lord Chancellor Hardwicke, that this shall be evidence of assets; and he would not put the plaintiffs to take a strict account of the assets of the testator, as there cannot now be a personal examination of the executors. And he said, nothing is more necessary than to keep executors to deliver inventories.

And in the case of *Orr v. Kaines*, Mar. 1750 (n), where the executor paid several legacies in full and died, having made no inventory, it was decreed by Sir John Strange, Master of the Rolls, that his representatives, having assets of the said executor, shall pay the rest. Not exhibiting an inventory, he said, which every executor ought to do, especially in a deficient estate, is an imputation upon him; and though not conclusive evidence, yet always inclines the court to bear harder upon an executor, because he may at any time relieve himself by an inventory, if he finds the estate deficient. He is admitted both at law on plea of *plene administravit*, and in equity on account of assets, to show that the money, for which by solemn inventory on oath he has charged himself, has by accident, as

(l) Swin. 228.

(m) 1 Ves. 75.

(n) 2 Ves. 193. [See also *Rex v.*

Blatch, 5 Ves. 113; *Backhouse v. Hunter*, 1 Cox, 342.]

perhaps failure of some great merchant, not come to his hands; so that the inventory not being finally binding, is one reason why he ought to exhibit one. Besides, every executor ought, after debts and funeral expenses, to see what remains for legatees; and if not enough for all, should make an estimate, and pay all in proportion; whereas in the present case, the executor having paid the rest in full, is the strongest evidence against him. The rule is, that whenever an executor pays a legacy, the presumption is, he hath sufficient to pay all legacies; and the court will oblige him, if solvent, to pay all the rest, and not permit him to bring a bill to compel the legatee, whom he voluntarily paid, to refund; although if the executor proves insolvent, so that there is no other way, the court will admit a bill by the other legatees to compel that legatee to refund. But that is not the case here; for the executor appears to have been solvent; and he hath acted so as that the court will presume him to have received assets sufficient for all the legacies.

By *goods* in the aforesaid constitutions and statute are included all the testator's cattle, as bulls, cows, oxen, sheep, horses, swine, and all poultry, household stuff, money, plate, jewels, corn, hay, wood severed from the ground, and such like moveables (*p*). Things to be put into the Inventory,—Goods (*o*).

Chattels comprehend all goods, moveable and immoveable, except such as are in nature of freehold, or parcel of it. And chattels are either *personal* or *real*: *personal* are such as belong immediately to the person of a man; and for which, if they be any way injuriously withheld from him, he hath no other remedy but by personal action. Chattels *real* are such as either appertain not immediately to the person, but to some other thing by way of dependency, as a box with charters of land; or such as are issuing out of some immoveable thing, as a lease, or rent for term of years; and chattels real concern the realty, lands and tenements, interest in advowson, in statutes merchant, and the like (*q*). Chattels.

But *fishes* in a pond, *conies* in a warren, *deer* in a park, *pigeons* in a dove-house, where the testator had the inheritance, or but for life, in the pond, warren, park, and dove-house, are not chattels at all, nor go to the executor, but to the heir with the inheritance; and therefore they are not to be put in the inventory of the goods and chattels of the party deceased (*r*). But if the testator have any tame pigeons, deer, rabbits, pheasants, or partridges, they shall go to the executors; and though they were not tame, yet if they were kept alive in any room, cage, or such like place; so fish in a trunk; also young

(*o*) [See *Hendren v. Shaw*, 1 Lee, &c.—ED.]
 51, for particulars of inventory. *Vide* (*p*) Law of Test. 379.
supra, "Of what Things," p. 86, 90; (*q*) 1 Inst. 118.
 and "Form and Manner," p. 201, (*r*) Went. 52; Swin. 422.

pigeons, though not tame, being in the dove-house, and not able to fly out (*t*).

Also *hounds, greyhounds, spaniels*, and the like, as they may be valuable, and may serve not only for delight but for profit, shall go to the executors (*u*).

Debts owing
by the de-
ceased.

Debts which the deceased owed to others ought not be put in the inventory, because they are not the goods of the deceased, but of other persons (*x*). Yet they may be put in, if it shall seem expedient (*y*). And this the rather, in case the clear value of the goods and chattels, (the debts owing by the deceased being deducted), shall not exceed the sum of 40*l.*, thereby the better to ascertain the mortuary.

And if these debts shall be put into the inventory, the ordinary shall do well to make diligent examination, whether the testator did owe any such, that thereby the legataries, and children of the deceased, and others, may not be defrauded of their just due, by any false pretence thereof (*z*).

Debts owing
to the de-
ceased.

Lindwood says, that *debts owing to the deceased*, of which there is not any *writing or obligation*, ought not to be put into the inventory before they be received; because, before that, they are not found to be debts, at least so as they may be handled or taken hold of. But afterwards, when such debts are received, they ought to be put into the inventory as goods newly accruing (*a*).

But unless they be bad debts, it seemeth best to insert them, and even if they be bad debts, or desperate, yet they may be inserted, specifying them as such. And if in the course of administration they shall be recovered, then they shall be accounted for in like manner as the rest of the personalty; and if they cannot be recovered, or so much of them as cannot be recovered, shall not be accounted for as any part of the goods of the deceased.

Leases.

All *leases* for years the executors shall have, and therefore leases ought not to be omitted forth of the inventory (*b*).

If a devise be of land to one and the heirs of his body for five hundred years, this is a lease for years, and therefore the executor shall have it; and the reason is, because an estate tail cannot be made of a term (*c*).

[The ecclesiastical court has no jurisdiction to direct an inventory of a leasehold estate under lives which is held on a mortgage (*d*).—ED.]

Estates *pur*
autre Vie.

Estates *pur autre vie*, that is, estates held by lease during the life of another person, ought also to be put into the inven-

(*t*) Law of Test. 379.

(*u*) Ibid.

(*x*) Lind. 176.

(*y*) Ibid.

(*z*) Swin. 423.

(*a*) Lind. 176.

(*b*) 1 Rolle's Abr. 915; Swin. 421.

(*c*) 1 Rolle's Abr. 915.

(*d*) [*Saville v. Morgan*, 1 Lee, 431.]

tory, the same being made distributable by the statute of the 14 Geo. 2, c. 20.

Before this statute, such estates were only assets for payment of debts by 29 Car. 2, c. 3, but not of legacies, except particularly derived thereout, nor were they distributable, and therefore they needed not to be put in the inventory (e).

Also the executor shall have all lands *extended* on any judgment, statute, or recognizance (f). Extent.

Also the executors shall have all arrearages of *rent* due at the death of the testator, and therefore the same shall be put in the inventory (g). Rent.

[In *Pitt* (by her guardian) v. *Pitt* (h), an administratrix to the effects of a ropemaker was directed to include in her accounts the profits arising from four apprentices, and to give security to the full amount of the inventory. She was allowed, however, her claim for mourning, but the court cannot call for an account of the profits subsequently to the death of the testator (i).—ED.] Profits from Apprentices.

Corn growing upon the ground ought to be put into the inventory, seeing it belongeth to the executor; but not the grass or trees so growing, which belong to the heir, and not to the executor (k). Corn or other Things growing.

Also *hops*, though not sown, if planted; and *saffron* and *hemp*, because sown, shall go to the executors (l).

But Mr. Wentworth thinks, that *roots* in gardens, as carrots, parsnips, turnips, skirrets, and such like, shall not go to the executor, but to the heir, because they cannot be taken without digging and breaking the soil (m).

But Lord Coke says, that if the testator shall set roots, his executors shall have that year's crop (n).

If a man be seised for life or in fee or tail in his own right, or in the right of his wife, or for years in the right of his wife, and sows the ground with corn, but dies before it is ripe, his executors shall have it, and not the wife or heir; but grass ready to be cut for hay, apples, pears, and other fruit on the trees, shall not go to the executors. And the reason of the difference is, because the former comes not merely from the soil, without the industry or manurance of man, as the latter doth (o).

Yet if a lessee at will sows the land with *hay seed*, and by this increases the grass, and the lessor enters and ejects him, the lessee shall not have it (p).

(e) *Oldham v. Pickering*, 2 Salk. 464. As to these estates, *vide supra*, "Of what Things," [and Section 3 of the New Will Act, p. 263.]

(f) Law of Test. 378.

(g) Ibid.

(h) [2 Lee, 508.]

(i) [*Pitt*, assignee of *Woodham*, v. *Woodham*, 1 Hagg. 250.]

(k) Swin. 421.

(l) Law of Test. 380.

(m) Wentw. 61, 62.

(n) 1 Inst. 55.

(o) Law of Test. 379.

(p) 1 Inst. 56.

But for *clover*, *saint foin*, and the like, the reason of manurance, labour, and cultivation, is the same as for corn, but no case hath occurred wherein these matters have come in question; this kind of husbandry having been in use only of late years.

If the wife had a lease for years as executrix, and the husband sows the ground with corn, and dies before it is ripe, the corn shall go to his executors, at least so much as is more than the yearly rent of the land; but if the husband and wife were joint tenants of the land, she shall have the corn, and not his executors (*q*).

If a parson sows his glebe land, and dies before severance, and after, his successor is admitted, instituted and inducted before the corn is cut; it shall go to the executors or administrators of the deceased, who must pay tithes thereof to the successor (*r*).

Things affixed
to the Free-
hold.

Things that are affixed to the tenement, and are made parcel of the freehold, ought not to be put in the inventory, because these belong to the heir, and not to the executor (*s*).

And therefore the *glass* annexed to the windows of the house, because they are parcel of the house, shall descend as parcel of the inheritance to the heir, and the executors shall not have it. And although the lessee himself at his own cost do cause the glass to be put into the windows, yet the same being parcel of the house, he cannot take the same away afterwards, without danger of punishment for waste. Neither is there any material difference in law whether the glass were annexed to the window with nails, or in other manner, either by the lord, or by the tenant, for being once affixed to the freehold the same cannot be removed by the lessee, but shall belong to the heir, and not to the executors; and therefore the same is not to be put into the inventory as part or parcel of the goods of the deceased (*t*).

The like may be concluded of *wainscot*, that it ought not to be put into the inventory as parcel of the goods of the deceased, for being annexed unto the house, either by the lessor or by the lessee, it is parcel of the house. And there is no difference whether it be affixed with great nails or little nails, or by screws, or irons thrust through the posts or walls of the house, for howsoever it be affixed, either in manner aforesaid, or in any other manner, it is parcel of the freehold, and if the executors shall remove it they are punishable for the same (*u*).

And not only glass and wainscot, but any other such like thing, affixed to the freehold or to the ground, with mortar and stone, as *tables dormant*, *leads*, *mangers*, and such like, for these belong to the heir, and not to the executor, and there-

(*q*) Law of Test. 380.

(*r*) 1 Rolle's Abr. 655.

(*s*) Swin. 421.

(*t*) Swin. 421.

(*u*) Ibid.

fore they are not to be put in the inventory of the deceased's goods (x).

So also of *mill-stones, anvils, doors, keys, window shutters*, none of these be chattels, but parcel of the freehold, or thereto pertaining, and therefore shall not go to the executors (y). Things affixed
to the Free-
hold.

An executor taking away a *furnace*, which was set in the middle of an house and not fixed to any wall, the heir brought an action of trespass against him, and it was adjudged for the heir that this should go as part of the freehold and inheritance of the heir. But in the case of *Day v. Austin*, Walmsley said, that Lord Dyer's opinion was, that where the furnace is not affixed to the wall, the lessee might within his term take it away, but not if it was fixed to the wall, for there it would strenghten the house (z).

Pictures and *glasses*, though, generally speaking, not part of the freehold, yet if put up instead of wainscot, or where otherwise wainscot would have been put, shall go to the heir, for the house ought not to come to the heir maimed or disfigured (a).

But in the case of *Harvey v. Harvey*, M., 14 Geo. 2 (b), in trover, by the executor against the heir, it was held by Lee, Chief Justice, that *hangings, tapestry, and iron backs* to chimnies, belong to the executor, who recovered accordingly against the heir.

And the law seemeth now to be held not so strict as formerly, and if these things can be taken away without prejudice to the fabric of the house, it seemeth that the executor shall have them: as tables, although fastened to the floor; furnaces, if not made part of the wall; grates, iron ovens, jacks, clock cases, and such like, although fixed to the freehold by nails or otherwise (c).

Lawton v. Lawton, Dec. 14, 1743 (d). The question was, whether a *fire-engine*, set up for the benefit of a *colliery* by a tenant for life, shall be considered as personal estate, and go to his executor, or fixed to the freehold, and go to a remainder-man. For the plaintiff, who was a creditor of the tenant for life, evidence was read to prove that the fire-engine was worth, to be sold, 350*l.*; and that it is customary to remove them; and that in building of sheds for securing the engine, they leave holes for the ends of timber, to make it more commodious for removal; and that they are very capable of being carried from one place to another. And it was argued, that the testator was dead greatly indebted; and it would be hard, when he has been laying out his creditors' money in erecting this engine, that they should not have the benefit of it, but

(x) Swin. 421.

(y) Went. 61.

(z) Law of Test. 380.

(a) 2 Vern. 508; Law of Test.

380, 381.

(b) Str. 1141.

(c) [11 Vin. Abr. 144.]

(d) 3 Atk. 13.

Things affixed
to the Free-
hold.

that the strict rule of law should take place. And it was compared to the case of a cider-mill, which is let in very deep into the ground, and is certainly fixed to the freehold; and yet Lord Chief Baron Comyns, at the assizes at Worcester, upon an action of trover brought by the executor against the heir, was of opinion that it was personal estate, and directed the jury to find for the executor. On the other hand, for the defendant, evidence was produced to show that the engine cannot be removed without tearing up the soil, and destroying the brick-work. By the Lord Chancellor Hardwicke: "This is a demand by a creditor of Mr. Lawton, who set up the fire-engine, to have the fund for payment of debts extended as much as possible. It is true, the court cannot construe the fund for assets further than the law allows; but they will do it to the utmost they can in favour of creditors. This brings on the question of the fire-engine, whether it shall be considered as personal estate, and consequently applied to the increase of assets for payment of debts. Now it appears in evidence that in its own nature it is a personal moveable chattel, taken either in part or in gross, before it is put up. But then it is insisted that fixing it in order to make it work, is properly an annexation to the freehold. To be sure in the old cases they go a great way upon the annexation to the freehold; and so long ago as Henry the Seventh's time, the courts of law construed even a copper and furnaces to be part of the freehold. Since that time, the general ground the courts have gone upon of relaxing this strict construction of law is, that it is for the benefit of the public to encourage tenants for life, to do what is advantageous to the estate during their term. What would have been held to be waste in Henry the Seventh's time, as removing wainscot fixed only by screws, and marble chimney-pieces, is now allowed to be done. Coppers, and all sorts of brewing vessels, cannot possibly be used without being as much fixed as fire-engines; and in brewhouses especially, pipes must be laid through the walls, and supported by walls; and yet, notwithstanding this, as they are laid for the convenience of the trade, landlords will not be allowed to retain them. This being the general rule, consider how the case stands as to the engine which is now in question. It is said there are two maxims which are strong for the remainder-man: first, that you shall not destroy the principal thing, by taking away the accessory to it. And this is very true in general, but doth not hold in the present case; for the walls are not the principal thing, as they are only sheds to prevent any injury that might otherwise happen to it. Secondly, it has been said, that it must be deemed part of the estate, because it cannot subsist without it. Now collieries formerly might be enjoyed before the invention of engines; and therefore this is only a question of *maius* and *minus*, whether it is more or less convenient for the colliery.

There is no doubt but the case would be very clear as between landlord and tenant. It is true, the old rules of law have indeed been relaxed chiefly between landlord and tenant, and not so frequently between an ancestor and heir at law, or tenant for life and remainder-man. But even in these cases it admits the consideration of public conveniency for determining the question. I think, even between ancestor and heir, it would be very hard that such things should go in every instance to the heir. One reason that weighs with me is, its being a mixed case between enjoying the profits of the land and carrying on a species of trade; and considering it in this light, it comes very near the instances in brewhouses of furnaces and coppers. That case also of the cider-mill, between the executor and the heir, is extremely strong; for though cider is part of the profits of the real estate, yet it was held by Lord Chief Baron Comyns, a very able common lawyer, that the cider-mill was personal estate notwithstanding, and that it should go to the executor. It doth not differ it, in my opinion, whether a shed over such an engine be made of brick or wood; for it is only intended to cover it from the weather and other inconveniences. This is not the case between an ancestor and an heir, but an intermediate case between a tenant for life and remainder-man. The reason of the thing weighs most in favour of the tenant for life, and is like the case of corn growing, which shall go to the executor, and not to the heir or remainder-man, it being for the benefit of the kingdom that corn should be sown. It is very well known that little profit can be made of coal mines without this engine; and tenants for life would be discouraged in erecting them, if they must go from their representatives to a remote remainder-man, when the tenant for life might possibly die the next day after the engine is set up. These reasons of public benefit and convenience weigh greatly with me, and are a principal ingredient in my present opinion. Upon the whole, I think this fire-engine ought to be considered as part of the personal estate of Mr. Lawton, and go to the executor for the increase of assets." And decreed accordingly.

Things affixed
to the Free-
hold.

But if a man be seised of a house, and possessed of divers heir-looms, that by custom have gone with the house from heir to heir, it seemeth that these, although no part of the freehold, shall go to the heir, and not to the executor, and therefore ought not to be put into the inventory (e).

Heir-looms.

So if an incumbent enter upon a parsonage house in which are hangings, grates, iron backs to chimnies, and such like, not put there by the last incumbent, but which have gone from successor to successor, the executor of the last incumbent shall not have them, but it seemeth that they shall continue in the nature of heir-looms; but if the last incumbent fixed them

(e) 1 Inst. 185.

there only for his own convenience, it seemeth that they shall be deemed as furniture, or household goods, and shall go to his executor.

Boxes with
Writings.

Writings and evidences which touch the inheritance shall go to the heir, and not to the executor (*f*).

And Swinburne says, that a box ensealed, or the chest with evidence of the land, though the same be not affixed to the freehold, yet because they contain those things which belong to the heir, they also belong to the heir, and not to the executors; and therefore they are not to be put into the inventory of the deceased's goods (*g*).

But as to this, Rolle makes a distinction, and saith, "If the writings which concern the inheritance are in a chest, the executors shall have the chest, and the heir the writings. But if the chest be shut, the heir shall have the chest also; but if it be not shut, the executor shall have the chest (*h*)."

But the author of the Law of Testaments observeth, that this distinction seemeth not to be well taken; for if it be a box purposed for the keeping of the deeds, the heir ought to have it, whether locked or open: on the other hand, if it be a box designed for other use, as for the keeping linen, it cannot be said to be appurtenant to evidences, although some be in it, for so may other things also; or perhaps it may be a chest or cabinet of great value, surely this shall not go to the heir, when perhaps there is not personal estate sufficient to pay the testator's debts (*i*).

If a further distinction seemeth necessary, it might be this, that if the executor will not open the box and deliver the writings, the heir, rather than not have the writings, may take the box also; but if the executor will deliver the writings and retain the box, it doth not seem that one box more than another can be said to be appurtenant to writings, so as to divest the property thereof out of the executor.

Profits of
Lands to be
sold.

By the 21 Hen. 8, c. 5, s. 5, if the person deceased shall devise any lands, tenements, or hereditaments, to be sold, neither the money thereof coming, nor the profits of the said lands for any time to be taken, shall be accounted as any of the goods or chattels of the said person so deceased; [*vide infra*, "*Payment of Legacies.*"]

Wife's Para-
phernalia (*k*).

But what shall we say to those goods which may seem to belong to the wife rather than to the husband, as her apparel, her bed, her jewels, or ornaments for her person; whether are they to be put into the inventory of the husband's goods, yea or nay? By the civil law, those belonging to the wife, which be called *bona paraphernalia*, are not to be put into the inventory of her husband's goods, neither are they subject unto the payment of the husband's debts; but whether the wife's apparel,

(*f*) Went. 62.

(*g*) Swin. 421.

(*h*) 1 Roll. Abr. 915.

(*i*) Law of Test. 381.

(*k*) See *Marriage*, [and above, "*Who may make,*" p. 64.]

with her bed, jewels, and ornaments for her person, be comprehended amongst those goods which the law calleth *bona paraphernalia*, is the matter in question. And it seemeth rather that they are not, saith Swinburne (m); her convenient apparel, agreeable to her degree, only excepted. Otherwise, whatsoever goods belong to the wife are presently, by virtue of the marriage, become the husband's, the property thereof being changed and transferred from the wife to the husband. Insomuch that without her husband's licence or consent she cannot dispose thereof, neither by act in her lifetime, nor at her death by her last will, which she might do if they were *bona paraphernalia*; wherefore those goods being the husband's, and not the wife's, and the property thereof being in him, and not in her, it may be concluded that in construction of law those goods above mentioned, and namely, the wife's jewels, chains, and borders, are to be put into the inventory of the deceased husband's goods.

Wife's Paraphernalia.

Rolle says (n), "The wife after the death of her husband shall have convenient apparel for her body, and not the executors of her husband; and of this convenience the court must be the judge. But she shall not have excessive apparel; and if she takes more than is convenient, she shall be taken to be an executor of her own wrong."

And if the husband deliver to his wife a piece of cloth for to make a garment, and dieth; although that this was not made into a garment in the life of the husband, yet the wife shall have this, and not the executor of the husband; inasmuch as it was delivered to her to this intent: but against the debtee of the husband, the wife shall have no more apparel than is convenient (o).

But in the case of *Hastings v. Douglas*, H., 9 Car. 1 (p): A chain of diamonds and pearl, worth 370*l.*, usually worn by Sir John Davis's wife, who was daughter of the Earl of Castlehaven, being by her husband's will devised from her, Berkeley and Jones were of opinion, that she being the daughter of a nobleman, and permitted to use them frequently as ornaments of her person, and they being convenient for her degree, she should have them as her paraphernalia; and when there are not debts to be paid (as it doth not appear that there are any in this case), she shall have them against the executors or administrators of her husband, and the husband cannot dispose of them from his wife by his will; but instantly by his death, the possession of them being in the wife's custody, the property is vested in her, and the husband cannot give them away; for it is not reasonable the husband should leave her naked of those jewels which she usually did wear, and are fit according to her

(m) Swin. 422.

(o) 1 Roll. Abr. 911.

(n) 1 Roll. Abr. 911; Law of Test. 383, 384.

(p) Cro. Car. 343; 1 Roll. Abr. 911.

Wife's Paraphernalia.

calling to wear. But Richardson and Croke were of opinion, that the will was good, and that she may not take them contrary to the devise; but if the husband had not made his will of them, but had left them to the disposition of the law, and the question had been betwixt the executor or administrator and the wife, where there be not any debts or legacies to be paid, or where there be assets to pay all debts and legacies besides those jewels, there peradventure the law will allow her to take, and to enjoy them as her paraphernalia.

But in the case of *Carey v. Appleton*, M., 26 Car. 2(*q*): The husband devised the jewels, which were the paraphernalia of the wife, and died. They were decreed to the wife.

And by Macclesfield, Lord Chancellor: "*Bona paraphernalia* are not devisable by the husband from the wife, any more than heir-looms from the heir; so that the right of the wife to her paraphernalia is to be preferred to that of a legatee (*r*)."

But it is said that *bona paraphernalia* shall not be retained by the wife against *debts*. And in the case of *Stubbs v. Stubbs*, H., 31 Car. 2(*s*), it was held, that where the real estate is chargeable, together with the personal, for the payment of debts, and the personal estate is deficient, the *bona paraphernalia* shall be liable before the real estate shall come in.

But in the case of *Tipping v. Tipping*, M., 1721 (*t*), by Macclesfield, Lord Chancellor: "*Bona paraphernalia* are liable to debts in favour of creditors only, and not in favour of the heir at law."

And if creditors of the testator by judgment take the jewels after his death in execution, when the heir or executor or trustees have other assets sufficient to pay such debts, this is a default in the trustee, for which the widow ought not to suffer as to her *bona paraphernalia* (*u*).

And in *Northey v. Northey*, Dec. 6, 1740 (*x*), Lord Hardwicke said, that the late cases have gone so far in the point of paraphernalia, that they have considered a wife in the nature of a creditor, and as having a lien upon real estate. Though the jewels in the present case were worth 3000*l.*, yet (he said) the value makes no alteration; and that there are several cases where there have been debts standing out against the husband, and yet the wife has been admitted as a creditor to the value of the paraphernalia, even upon trust estates created for payment of debts.

And in the case of *Inclendon v. Northcote*, Mar. 2, 1746 (*y*), it was said by Lord Hardwicke, that where there is a trust estate, charged with payment of debts, which is sufficient for

(*q*) 1 Cha. Ca. 240.

(*r*) 1 P. Wms. 730.

(*s*) Cha. Ca. Finch, 415. [See also *Grey v. Grey*, 2 Swanst. App. 602.]

(*t*) 1 P. Wms. 730.

(*u*) 2 P. Wms. 80.

(*x*) 2 Atk. 78, 79.

(*y*) 3 Atk. 438; see *Boynton v. Parkhurst*, 1 Bro. 576.

that purpose, she may come round upon the trust estate to be reimbursed to the value of her paraphernalia, if the personal has been exhausted by her husband's creditors. And so it hath been determined in several cases. Wife's Paraphernalia.

And in *Snelson v. Corbet*, June 16, 1746 (z), where the question was, whether paraphernalia shall be liable to the payment of simple contract creditors and legacies, Lord Hardwicke said, "At law, where the husband dies indebted, the widow cannot have her paraphernalia; but this court doth not determine so strictly: for if the personal estate hath been exhausted in payment of specialty creditors, she shall stand in their place as to so much upon the real assets of the heir at law; for she has a prior right, and a superior one to legatees, who take only from the bounty of the testator.

Also if an husband pledges the wife's paraphernalia, and dies leaving a sufficient estate to redeem the pledge and pay all his debts, she shall be entitled to have it redeemed out of the husband's personal estate; but the husband may alienate the same in his lifetime (a).

Also, where a daughter's *portion* was to be paid out of her father's personal estate, the court would not allow the widow to retain her paraphernalia (b).

And where by *marriage articles* it was agreed, that the wife should have no part of the husband's personal estate but what he should give her by his will, it was declared by the court that this bars her of her paraphernalia, and from jewels given to her by her husband in his lifetime (c).

Yet notwithstanding all that hath been said, if we shall respect what hath been used and observed, such hath ever been the general and ancient custom or rather courtesy of the province of York, as thereby widows have been tolerated, to reserve to their own use, not only their apparel, and a convenient bed, but a coffer with divers things therein necessary for their own persons; which things have been usually omitted out of the inventory of their deceased husband's goods, unless peradventure the husband was so far indebted, as the rest of his goods would not suffice to discharge the same; in which case the wife's jewels, chains, and borders, and such like, being things of decency or ornament, and not of necessity, have been usually prized and put into the inventory amongst other goods of the deceased, towards the payment of his debts, and so they ought to be (d).

Goods to which the husband is entitled in right of his wife, and as administrator to her, are not to be put in the inventory Wife's Goods or Chattels.

(z) 3 Atk. 369.

(a) 3 Atk. 394, 395.

(b) Cha. Ca. Finch. 146.

(c) 2 Vern. 83; S. C. *Read v. Snell*.

2 Atk. 642; [*vide supra*, "Who may make," 64.]

(d) Swin. 422.

after her death; but things which are in action must be put in (e).

In the case of *Sir John St. John*, T., 15 Car. 1 (f), the lady C. was possessed of divers leases, and conveyed them in trust, and afterwards married with A. B. The lady received the money upon the leases, and with part of the money bought jewels, and other part of the money she left, and died. A. B. takes letters of administration of the goods of his wife; and in a suit in the ecclesiastical court, the court would have compelled him to have given an account of the jewels, and for the monies, to have put them into the inventory. But the opinion of the whole Court of King's Bench was, that he should not put them into the inventory; because the property of the jewels was absolutely in him as husband, and he had them not as administrator: but such things as be in action, and which he shall have as administrator, he shall be accountable for, and they shall be put into the inventory. And for the money received upon trust, it was resolved that the same was the money of the trustees, and the wife had no remedy for it but in equity; and therefore the husband shall have it as administrator. And in that case it was resolved, that if a woman do convey a lease in trust for her use, and afterwards marrieth, in such case it lieth not in the power of the husband to dispose of it; and if the wife die the husband shall not have it.

The kind of
Inventory
expected by
the Court.

[The court exercises a discretion as to the sort of inventory it requires (g); but generally where it decrees one, it expects it to be given in, and to be full and satisfactory (h). It can only require that all the party *died possessed of* shall be included in the inventory (i).—ED.]

Valuation.

By the aforesaid constitution of Othobon (k), the inventory shall be made in the presence of some credible persons, who shall *competently understand the value of the deceased's goods*: for it is not sufficient to make an inventory, unless the goods therein contained be particularly valued and appraised by some honest and skilful persons, to be the just value thereof in their judgments and consciences, that is to say, at such price as the same may be sold for at that time.

But as to the value of the goods upon the appraisement, it is not binding, nor very much regarded at the common law; for if it is too high, it shall not be prejudicial to the executor or administrator; and if it be too low, it shall be no advantage to him: but the very value found by the jury when it comes in question whether the executor hath fully administered, or hath assets or not, is that which is binding (l).

(e) Swin. 422; God. O. L. 153.

(h) [*Plunkett v. Sharpe*, 1 Lee,

(f) Mar. 44; Swin. 423; [*vide* 623,]

supra, "Form and Manner, 152.]

(i) [*Pitt* (assignee of Woodham) v.

(g) [*Reeves v. Freeling*, 2 Phill.

Woodham, 1 Hagg. 250.]

56.]

(k) Swin. 425, 426.

(l) Swin. 426; Went. 83, 84.

By the aforesaid constitution of Archbishop Stratford, the inventory shall be *delivered to the ordinary, within a time to be appointed by his discretion*. Not arbitrarily (saith Lindwood) but in a reasonable manner, according to the exigency of persons, things, and places (*m*).

In what Cases an Inventory may be dispensed withall.

And as the time for exhibiting such inventory is left to the discretion of the ordinary, so may he remit the making of an inventory, for a reasonable cause: as where it may be expedient that the quantity of the goods should not be divulged (*n*).

As was done in *Boon's case*, July 18, 1682 (*o*): who dying possessed of a large personal estate, made his eldest son executor, and among other bequests, gave his second son 2000*l.*, to be paid at three several payments. The said second son took out process against the elder brother, and caused him to be cited before the judge of the Prerogative Court (where the will was proved) in order to compel him to bring in an inventory. But it appearing to the judge, that the two first payments were made, and the third offered to be made, he gave sentence, that there was no need of an inventory at the instance of the plaintiff: which was confirmed by the Delegates, first upon appeal, and afterwards upon a commission of review.

[An inventory cannot be required of personal estate situate in Germany (*p*). An inventory has been refused to the widow of a legatee, where a testator has no effects at the time of his death, he having during his life conveyed all his personal estate by a bill of sale in consideration of a debt (*q*). “I know,” said Sir W. Wynne, in *Myddleton v. Rushout* (*r*), “of only one case in which the court could refuse to compel the production of an inventory, i. e. if a creditor has brought a suit in Chancery for a discovery of assets (*s*); in such a case the court has said that the party shall not proceed in both courts.” “Lapse of time,” said Sir John Nicholl, in *Phillips v. Bignell* (*t*), “may sometimes weigh with the court; the court would be unwilling to open old accounts, where documents have been lost, and vouchers destroyed; but the argument founded on lapse of time does not apply in the *present* instance, since, as one of the parties is a minor, all the documents and vouchers must have been preserved, and it is difficult to surmise why the executors should refuse to produce them; when the minor attains the age of maturity, or marries, she will have an undoubted right to call for them.” An account and inventory may be dispensed with, if not applied for till after so long a period that, *in conjunction with circumstances*, it affords a

Where the Ecclesiastical Courts will refuse to compel Production of.

(*m*) Lind. 177.

(*n*) Lind. 176.

(*o*) Raym. 470.

(*p*) [*Raymond v. Baron von Watteville*, 2 Lee, 554.]

(*q*) [*Leighton v. Leighton*, 2 Lee, 356.]

(*r*) [1 Phill. 247.]

(*s*) [See the case of *Pearson v. Gamon*.]

(*t*) [1 Phill. 242; *Bowles v. Harvey*, refused after thirty-five years, 4 Hagg. 241; after seventeen, *Higgins v. Higgins*, 4 Hagg. 242.]

reasonable presumption of the estates being fully administered (*u*).

Decree for
Inventory
where re-
fused.

[In a suit for the recovery of a legacy, an inventory was refused because the executrix had, in her answers, allowed that there were assets sufficient to pay the legacy, and the costs of the suits (*v*). An inventory was refused to the widow of a legatee, where the testator had no effects at the time of his death, he having during his life conveyed all his personal estate by a bill of sale, in consideration of a debt (*x*).—ED.]

How far the
strict For-
malities be-
fore required
are necessary.

Although appraisements and inventories shall not be made according to the ecclesiastical law, nor to the statute aforesaid, yet, by the practice of the courts, if the goods of the deceased shall be appraised by any honest persons of the neighbourhood, and reduced into an inventory, and afterwards the said inventory shall be in due time exhibited before the judge who proveth the will or granteth the administration, upon the oath of the executor or administrator, such inventory shall receive credit in all causes and courts; and he that exhibiteth the same shall be freed from the burthen of proving the truth of the inventory, that is, that the deceased had no more goods; and he retorteth the proof of any goods having been omitted, upon the legatary or other person pretending interest in the goods of the deceased (*y*).

By which oath of the executor or administrator is to be understood, the oath which he took at the time of granting the probate or administration: unless the party be called afterwards to exhibit an inventory upon his corporal oath; for then he shall again take a special oath of the truth of the inventory, notwithstanding the former general oath that he took at the time of granting the probate or letters of administration (*z*).

Strictness re-
quisite in con-
testation of
Suit.

For sometimes it is demanded, and by the judge decreed, at the instance of the party having interest in the goods of the deceased, that an inventory be exhibited upon the oath of the executor or administrator, before the issuing of the probate or letters of administration under seal; and then, notwithstanding the former general oath had been taken for the faithful execution of the will or administering the goods of the deceased, and for exhibiting a true inventory, a special oath hath been used to be taken, at the time of exhibiting the inventory, of the truth thereof; and that, either personally, or by virtue of a commission (*a*).

Appraise-
ment before
the granting
of Probate.

And sometimes, before the granting, or at least before the issuing of the probate or letters of administration, (instead of an inventory of the goods of the deceased upon the oath of the

(*u*) [See *Holland v. Prior*, 1 M. 356.]

& K. 245; *Ritchie v. Rees and Rees*,
1 Add. 144.]

(*v*) [*Fleet v. Holmes*, 2 Lee, 101.]

(*x*) [*Leighton v. Leighton*, 2 Lee,

(*y*) 1 Ought. 344.

(*z*) Ibid.

(*a*) 1 Ought. 344; [*vide supra*.]

party,) at the request of some person having interest, the judge issueth a commission for the appraisement and true valuation of the goods, rights and credits, and inspection of the obligations, leases, and other writings and papers whatsoever, concerning the personal estate of the deceased, at the house of the deceased, or elsewhere, wheresoever his goods, rights or credits, remain or be, on such a day or days, with continuation and prorogation of the time and place, as shall be needful (b).

Appraise-
ment before
the granting
of Probate.

Also in these cases there usually issueth a monition against the other party in special, and all others in general, with whom any of the goods, rights or credits of the deceased remain and be; that they exhibit or show, or cause to be exhibited or showed, really and with effect, to the appraisers by virtue of the commission aforesaid appointed, at the time and place of the execution thereof, the aforesaid goods, rights and credits of the said deceased, and also the bonds, leases, and other writings and papers, concerning the personal estate of the deceased remaining or being with them or any of them, to the end that they may be appraised and put in the inventory: on pain of law, and of contempt (c).

And such commission being duly executed, the inventory is brought and exhibited, signed by the hands of the commissioners or appraisers, or two of them, at the least; without the oath of the party for the truth thereof (d).

And in such cases an inventory also is often required upon the oath of the executor or administrator, of such goods of the deceased as have been already disposed of (e).

[Such a commission of appraisement is only a more solemn inventory (f); and it may be prayed after an inventory has been exhibited, if the latter has not been accepted and allowed to be complete. In some respects it is held to be more convenient than an inventory, because that cannot be given in but by a party in possession of the effects; whereas a commission of appraisement may be executed, whoever is possessed of them (g). A monition may be taken out against persons in possession of the effects of the deceased, to show them to the commissioners (h).

[An inventory exhibited before administration, that is, before the person exhibiting is armed with authority to collect all the effects, must necessarily be very imperfect, but from whatever cause, it has now fallen into desuetude; and according to modern practice is not exhibited, unless the executor or

(b) 1 Ought. 344.

(c) 1 Ought. 344, 345.

(d) 1 Ought. 345.

(e) Ibid.

(f) [Watson v. Milward, 2 Lee, 333.]

(g) [Ibid.; and Stote v. Tyndall, 2 Lee, 405.]

(h) [Smith v. Oram, 2 Lee, 256; see also on the subject of such commissions, Franco and Franco v. Alverenza, 1 Lee, 187; Leggatt v. Leggatt, ibid. 408; Clark v. Clark, 2 Lee, 269; Pickering v. Towers, ibid. 413; Haselfoot v. Haselfoot, ibid. 477; Beebee v. Beebee, ibid. 546.]

administrator is cited for that purpose in the ecclesiastical court. We have now to consider whom the court considers as entitled to call for an inventory. As a primary rule, the court always inquires into the interest of any party requiring an account and inventory; but when it sees any kind of interest, it enforces that which by law is generally required; but it has no jurisdiction to decree an inventory to a person who has not established an interest in the property (*i*).

Who may
call for an
Inventory,
et contra.
General Prin-
ciples in re-
spect of.

[“It has been laid down,” said Sir John Nicholl, in *Phillips v. Bignell* (*j*), “in a variety of cases, that a probable or contingent interest will justify a party in calling for an account and inventory. This was holden in *Salter v. Sladen*, *Snow v. Strutt*, and *Myddleton v. Rushout* (*k*). It is not necessary to particularize the circumstances of these cases; but in all of them it was laid down that a probable or contingent interest was sufficient, because the production of an inventory was so much a matter of duty, that the executor was bound to exhibit it, even where there was an *appearance* of interest in the party calling for it (*l*). My predecessor so much discouraged all hanging back in cases of this description, that he has generally condemned the parties, who have been guilty of it, in costs.”

Assignees.
Of Bankrupt.

[The prerogative court cannot take notice of the statute of limitations. In a case of bankruptcy, affidavit of the amount of a debt is properly made by one of the assignees, who might call for an inventory. It is sufficient for the court if there is an appearance of a debt (*m*).

Of Insolvent.

[The court will not, at the instance of the assignee of an insolvent, and on a suggestion that the insolvent had not received his distributive share, call upon the widow and administratrix of the father of the insolvent for an account and inventory, after a long acquiescence of the insolvent and assignee; and when it is shown that a valuation and inventory of the deceased's effects were made shortly after his death, and facts are proved from which it may be fairly presumed that the insolvent had received considerably more than his full share (*n*).

Executors.

[In a suit for a legacy an inventory has been refused, because the executrix had, in her answers, allowed there were assets sufficient to pay the legacy and costs of suit (*o*). And the court will compel an executor to bring in an inventory at the suit of a creditor, by a bond of the testator, notwithstanding its alleged invalidity, and though a suit is actually depending on the point at common law (*p*); nor will the court notice the

(*i*) [Sir W. Wynne, *Myddleton v. Rushout*, 1 Phill. 247; *Lascelles v. Jobber*, 1 Lee, 443.]

(*j*) [1 Phill. 241.]

(*k*) [1 Phill. 244; see also *Reeves v. Freeling*, 2 Phill. 57.]

(*l*) [Sir W. Wynne.]

(*m*) [*Philipson and D'Escherney v. Harvey*, 2 Lee, 345.]

(*n*) [*Pitt, assignee of Woodman, v. Woodham*, 1 Hagg. 247.]

(*o*) [*Fleet v. Holmes*, 2 Lee, 101.]

(*p*) [*Gale v. Luttrell*, 2 Add. 234.]

release of a legatee (*q*); nor will a court of equity interfere on the ground that there is an equitable demand against the personal estate (*r*). An executor (at least one who has a special interest) may call upon his co-executors for an inventory (*s*).

[A contingent interest in the residue entitles a party to call for an inventory, and to have notice of the sureties (*t*). An account and inventory may be demanded of an executor by a residuary legatee, who has given a release (*u*).] Legatees.

[In the case of minors, the court orders an inventory *ex officio* (*x*).] Minors.

[A right to call for an inventory may be barred by a release (*y*).] Right to call for, how barred.

[A physician is not entitled to call for an inventory, as a creditor for fees due from the deceased (*z*).] A Physician.

[As to the fulness of statement necessary (*a*) there should be a clear *constat* of the debt before an inventory is decreed at the suit of a creditor (*b*); and then he is entitled to an inventory of the effects of an intestate (*c*); but he has no right to interfere in an administration bond (*d*). A creditor having made his option to sue in Chancery, by a bill of discovery, must be bound by such option to proceed in that court, and cannot call for an inventory in the prerogative (*e*). A creditor is entitled to a statement of the effects, which have come to the hands of the executor (*f*). Where an administration has been granted to a guardian *durante minoritate* of a widow, and the widow, on coming of age, renounces in favour of a creditor, the creditor has a right to call on the original administrator for an account and inventory (*g*).] Creditors.

[The guardian of a minor is obliged to exhibit an account and inventory of an administration *pendente lite* (*h*). An executor is bound to exhibit an account and inventory at the suit of the party interested in the property, for which he is executor (*i*). In *Ritchie v. Rees* (*k*) it was held, that the] Who is bound to exhibit.

(*q*) [*Kenny v. Jackson*, 1 Hagg. 105.]

(*r*) [*Backhouse v. Hunter*, 1 Cox, 342; *Rex v. Blatel*, 5 Ves. 113.]

(*s*) [*Paul v. Nettlefold*, 2 Add. 237, and see note.]

(*t*) [*Roberts v. Roberts*, 2 Lee, 399.]

(*u*) [*Kenny v. Jackson*, 1 Hagg. 105.]

(*x*) [*Roberts v. Roberts*, 2 Lee, 399.]

(*y*) [*Millington v. Sorsby*, 1 Lee, 525.]

(*z*) [*Baron von Solendahl v. Dr. Hampe*, 1 Lee, 102.]

(*a*) [*Leighton v. Leighton*, 2 Lee, 356; *Akerman v. Gybson*, 2 Lee, 511.]

(*b*) [*Bosworth v. Craddock*, 1 Lee, 338.]

(*c*) [*Timbrell v. Rice and Welch*, 1 Lee, 471; see also *Smith v. Pryce*, 1 Lee, 569.]

(*d*) [*Hackman v. Black*, 2 Lee, 251.]

(*e*) [*Pearson v. Gamon*, 2 Lee, 268.]

(*f*) [*Barclay v. Marshall*, 2 Phill. 188.]

(*g*) [*Taylor v. Newton*, 1 Lee, 15.]

(*h*) [*Brotherton v. Hellier*, by Sarah Harris, his guardian, 2 Lee, 131.]

(*i*) [*Phillips v. Bignell and others*, 1 Phill. 239; *Myddleton v. Rushout*, 1 Phill. 244.]

(*k*) [1 Add. 158.]

representatives of a deceased administrator, *cum testamento annexo*, although not at the same time, those of the first testator were liable to be called on for an inventory and account, upon a reasonable presumption being raised that any part of the effects of the first testator had travelled into their hands. The executors of a deceased executor, though not the personal representatives of the original testator, (there being then an executor of the original testator still living,) are compellable to bring in an inventory of the effects of the original testator. The court will compel an original executor to bring in an inventory, &c. at the suit of a creditor by the bond of the testator, notwithstanding its alleged invalidity, and a suit as to this actually commenced, and then depending at common law (l).—ED.]

Jurisdiction
of the Eccle-
siastical
Court.

Case of
Catchside v.
Ovington.

But after the inventory is exhibited, a creditor shall not be admitted to object thereto in the ecclesiastical court; for the statute of 21 Hen. 8, which requires the executor or administrator to make an inventory, only enjoins them to deliver it upon oath into the keeping of the ordinary, and the ordinary, by the said statute, is required to receive the same so presented or tendered to be delivered. As in the case of *Catchside v. Ovington*, T., 6 Geo. 3 (m), it was moved for a prohibition to the ecclesiastical court, on behalf of Mrs. Catchside, the administratrix. The case was, she had been cited into an inferior ecclesiastical court, at the promotion of Anne Ovington, a creditor, to exhibit an inventory. She brought one in, and the creditor objected to it. There was a decree for the creditor. The administratrix appealed to the superior ecclesiastical court, which affirmed the decree. The suggestion for a prohibition was their want of jurisdiction. Unto which it was answered, on showing cause, that it being after sentence, it was now too late for a prohibition, unless it shall appear that they have determined contrary to law. By Lord Mansfield and the court: "It appears upon the face of the proceedings, that the spiritual court hath no jurisdiction." And the rule for a prohibition was made absolute.

Objections to
Inventories.

[But the Prerogative Court, notwithstanding this and other decisions, has always adhered (n) to the practice of entertaining objections to inventories. The reasons which justify it in so doing, the history of its authority, and the cases at common law, with which such practice seems at variance, are fully discussed in Sir John Nicholl's elaborate judgment in *Telford v.*

(l) [*Gale v. Luttrell and another*, 2 Add. 234.]

(m) Bur. Mans. 1922.

(n) [*Winchlow v. Smith*, 1 Lee, 416; *Plunket v. Sharpe*, ibid. 623; *Prentice v. Farrant*, ib. 349; *Turner, by his Guardian, v. Hall*, 2 Lee, 502; *Watson v. Milward*, ibid. 332; *Grove*

v. Addis, ibid. 561; *Butler v. Butler*, 2 Phill. 37; *Barclay v. Marshall*, ibid. 188; *Telford v. Morison*, 2 Add. 321; *Hunter v. Ryder*, ibid. 311; *Brogden v. Brown*, ibid. 336; *Younge v. Skelton*, 3 Hagg. 780. *Vide infra*, this last case, under "Account."—ED.]

Morison (o). The learned judge said, “The jurisdiction of the court, in the case in point, is denied, not so much *avowedly* upon any reason, or with reference to any principle, as it is upon the authority of two cases determined in prohibition, that of *Catchside v. Ovington*, and that of *Henderson v. French* (p), the latter itself, by the way, founded, partly no doubt, on the former, which must be taken to have had at least *some* weight with the court, in its character of *precedent*, as and for which it was cited in the latter case. In a third case, indeed that of *Hinton v. Parker* (q), there is a *dictum* to a similar effect with the judgments in the other two, *so far as that dictum itself goes*. But the *principle* upon which that *dictum* proceeded, be it what it might (for it is not *said*, nor is very easy to be *conjectured*), at least gives no countenance whatever to the *avowed* principle upon which the other two cases were *decided*. For in the case of *Hinton v. Parker*, the power of the ecclesiastical court to entertain objections to an inventory, in one of the *only* two cases in which it has any pretence to exercise such a power, namely, at the suit of a *legatee*, is admitted: a prohibition is actually denied on the ground of its having such power. The *dictum*, a mere *dictum*, is only to this effect, that the ecclesiastical court has no such power, at the suit of a *creditor*. But the principle upon which the prohibition seems to have gone in the case of *Catchside v. Ovington* and the other (r), namely, that under the statute of Henry 8, the ecclesiastical court is merely ministerial in this matter of inventories—goes to deprive the ecclesiastical court of the power of entertaining objections to an inventory altogether, whether at the suit of a creditor or at that of a legatee, as will presently appear.

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[“It is much to be regretted that the ecclesiastical court should be prohibited in any matter wherein jurisdiction has *long* been conceded to it, until (without offence be it spoken) the court applied to for the prohibition has been attended by *civilians*, in order to its being fully instructed as to *all* the points raised by the application. The very circumstance of jurisdiction having been long conceded to it, in any case, implies that its jurisdiction in that case is well founded and of public convenience—and before the further exercise, at least,

(o) [2 Addams, 321.]

(p) 3 Burr. 1922; [S. C. 5 M. & S. 406.]

(q) [8 Mod. 168.]

(r) [In the case of *Catchside v. Ovington*, however, *that* the prohibition went upon the construction of the statute of Hen. 8 (21 Hen. 8, c. 5, s. 4), as making the ecclesiastical court merely ministerial, is a statement which rests, not on the au-

thority of the report itself, but on that of the editor of the edition in 1790, who so says, in a note on the report. All which the report itself says, is this—“By Lord Mansfield and the court:—It appears, *on the face of the proceedings*, that the spiritual court hath no jurisdiction.” But what the *proceedings* had been does not appear from the report.]

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of *such* a jurisdiction, is prohibited to the spiritual court, it should, perhaps, be heard by its own counsel in its defence, as better apprised of those matters more immediately appertaining to the peculiar law and ancient practice of the spiritual court, which the application to the temporal court for a prohibition in that case almost necessarily involves, than counsel, who practice in the temporal courts *only*, can well be supposed to be. Now in the cases relied on in the present instance, against the jurisdiction of the ecclesiastical court, the prohibition seems to have gone without *much* discussion of any sort: and it certainly went without the Court of King's Bench at the hearing of either having been attended by civilians, that I am able to discover. But the ecclesiastical court in those cases was prohibited in a matter wherein, as will presently be shown, jurisdiction *had* long been conceded to it: and that the exercise of its jurisdiction in that matter *was* of public convenience can hardly be questioned. It is of *great* convenience to creditors and legatees (for the same considerations apply to both) to obtain a *constat* of assets before they engage here or elsewhere in perhaps expensive litigations for the recovery of debts or legacies. A disclosure of assets, the executor or administrator is bound to also by his very oath of office. But all this is merely nugatory if an executor or administrator can evade a disclosure of assets by any paper exhibited here, which he chooses to call an inventory, which must however be, if this court is merely ministerial in this matter of inventories, and can entertain no objections of any sort to an inventory as now contended. Of whom but persons studious of concealment are inventories usually sought through the intervention of these courts? But if these courts are *functi officio*, the instant that any thing in the name of an inventory is exhibited as to any benefit that in nine cases out of ten can be reasonably expected to result from them, this matter of exhibiting inventories might well be abolished altogether.

[“ The Court of King's Bench, in issuing its prohibition in the cases referred to, seems to have taken up this matter as if both the obligation of exhibiting an inventory, and the jurisdiction of these courts over inventories, originated with and rested solely upon the statute of Henry 8. This at least is to be inferred from the printed reports both of the arguments, and especially of the judgments in those cases. In that of *Henderson v. French*, which is reported most at length of the two, it appears, indeed, that the present Mr. Justice Littledale, who was then counsel, did state, in showing cause against the rule *nisi* for a prohibition, that it had been the practice of the court sought to be prohibited (the Consistory Court of Carlisle) to permit exceptions to be taken to inventories time out of mind: and entries of such proceedings in that court from the year 1636 to 1812, were produced in support of that statement;

the earliest, however, of these, that in 1636, it is observable, being long subsequent to the statute of Henry 8. But the counsel who argued in support of the rule, Mr. Scarlett, without any *apparent* reference to all this, as wholly beside the question, was content, by way of answer, with a mere reference to and argument upon the statute of Henry 8. In the words of the report, ‘Scarlett, contra, cited 21 Hen. 8, c. 5, s. 4, which he contended only requires an executor to make an inventory and to deliver it into the keeping of the bishop or ordinary.’ And the court *seems* to have taken the same *limited* view of the case in its judgment: for ‘the court were of opinion (the *words* of the report again) that as the *statute* directed the executor, for the security of the creditors and legatees, to make an inventory to the bishop or ordinary; and that no bishop or ordinary should, *under pain of 10l.*, refuse to take such inventory, his office was merely *ministerial*,’ adding, ‘if the statute had intended more, it would have so said.’

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[“ But whoever is acquainted with the old law and practice of these courts, must be aware that neither inventories themselves nor the jurisdiction of these courts over inventories, is at all to be traced up or ascribed to the statute of Henry 8. Lyndewood, for instance, who wrote long before the statute, may be cited in proof of this, who in the 13th title of his third book *De testamentis*, enters pretty fully into the matter of inventories, and shows them to have been at *that* time *generally* under the cognizance of the spiritual court. Nor does it seem to have been long *suspected* even that the jurisdiction of these courts in this particular was *abridged* by the statute of Henry 8, This may be collected from Swinburne, in whose book it appears that inventories and accounts were still required *by* these courts of executors and administrators, at the suit of those interested in the effects of testators or parties dead intestate, and might be questioned *in* these courts, notwithstanding this, and long subsequent to the statute of Henry 8, when Swinborne wrote. There are several sections in the sixth part of his book, setting out *when* the inventory is to be made, *what* is to be put in it, and the effect and benefit of it; and it is there expressly also said, that ‘if any creditor or legatory do affirm that the testator had any more goods than be comprised in the inventory, he must prove the same: *otherwise* the judge (the ecclesiastical judge) is to give credit to the inventory,’ clearly not making him merely *ministerial* in this matter, and so unable to entertain objections of any sort to an inventory.

[“ The object of the statute which is supposed to have *this* effect (I mean that of *making* these Courts merely ministerial) is so declared in its title, and runs so much through its enactments, as hardly to be mistaken. The title is, ‘What fees ought to be taken for probate of testaments.’ And the pre-

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amble as clearly shows the true, I might almost say, the sole, object of the statute to have been, the restriction of fees. The order respecting inventories occurs (incidentally, as it were) in the middle of a section (the 4th s. of the act), which, after stating how much the ordinary shall take in particular cases, of wills or intestacies, goes on to enact, ‘*that* the executor, or, in case of an intestacy, the administrator, calling or taking to him such person or persons, two at the least, to whom the deceased was indebted, or had made any legacy, and upon their refusal, or absence, two other honest persons, being next of kin to the deceased, and in their default or absence, two other honest persons, shall, in their presence, and by their directions, make, or cause to be made, a true and perfect inventory of all the goods, chattels, wares, merchandises, as well moveable as not moveable, whatsoever, that were of the said deceased; and the same shall cause to be indented; whereof the one part shall be by the said executor or administrator, upon his oath, to be taken before the ordinary, &c., on the holy Evangelists (*averred*) to be good and true; and the same one part indented, shall deliver into the keeping of the said ordinary, &c., the other part thereof to remain with the said executor or administrator; and that no ordinary, &c., upon the pain in this estatute, hereafter contained, refuse to take any such inventory to him presented or tendered, to be delivered, as is aforesaid.’

[“ Now it is pretty evident, that this part of the act neither does, nor was intended to, *confer* any jurisdiction on the Ecclesiastical Court, with respect to inventories. As little can it be construed to have taken any away. What it does is this: it regulates the mode of making inventories; as, especially, that the inventory shall be made in duplicate, one part to be kept by the ordinary: and, in effect (as taken in conjunction with the whole act, and the inception of this fourth section) prescribes, that the ordinary shall receive that one part so committed to his keeping, without exacting additional fees—which last I take to be what the legislature had *principally* in view, in that part of the order respecting the *receiving* of inventories by the Ecclesiastical Court itself. Nor is there in this fourth section, as might be inferred from the printed report of the case of *Henderson v. French*, in Maule and Selwyn, any *special* penalty of 10*l.* imposed on the ordinary, for a contravention of the statute in the matter of inventories; from which penalty imposed, the Court of King’s Bench seems, *partly*, to have inferred, that the ordinary’s office was so, *merely*, ministerial in that matter. That penalty, a *general* penalty, is imposed by a subsequent *general* section (the 7th), which enacts, that ‘every ordinary, &c., that shall do, or attempt, or cause any thing to be done or attempted, against this act or ordinance (the whole statute, that is) *in any thing*, shall forfeit and lose, for every time so offending, to the party grieved in that behalf,

so much money as he shall take contrary to the present act ;' (still with reference, this, to the main object of the act, as explained above, and a further proof of such being the main object) 'and over that, shall lose and forfeit 10*l.* sterling—a moiety to the king, and the other moiety to the party grieved in that behalf, that will sue, &c., for recovery of the same.' And as to any jurisdiction which the ecclesiastical court, then- tofore, had over inventories not being taken away by this fourth section, this is put beyond all manner of doubt by another general (the 8th) section, which is in these words: 'provided always, that this present act shall not be prejudicial to any ordinary, or any other person which now have or hereafter shall have authority for probate of testaments ; but that every of them shall and may convent before them all and every person or persons, made and named executor or executors of any testament, to the intent to refuse or prove the testament or testaments of that testator or testators ; and to bring in inventories, and to do every other thing concerning the same, as they might do before the making of the act.'

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[“ Here then the jurisdiction is not only not taken away from, it is expressly reserved to, the ordinary. The restraining of fees is the great object of the act ; the limiting the jurisdiction of these courts is not its object at all. The act neither originated the obligation of exhibiting inventories ; nor did it, in my humble judgment, render the spiritual court merely ministerial, concerning inventories—confine it, that is, to the mere receiving of inventories, when exhibited. On the contrary, it reserved to it all the powers in this matter, which it had before the act ; of which powers, that of examining alleged omissions in inventories indisputably was one.

[“ If, however, the Court of King's Bench had put a different construction upon the statute, having all these matters fully before it, it would have been the duty of this court to have acquiesced in that construction, to say the least, in its public capacity. The court therefore, in that case, would undoubtedly prohibit itself, by admitting the validity of the present objection. But I am not disposed to do this, as the matter now stands ; and the rather, as I find that my predecessor did not conceive that his hands were tied up in a case like the present, by the decision of the Court of King's Bench, in the case of *Catchside* and *Ovington* ; the principal case, that is, on the authority of which it is contended, that it is incompetent to the court to proceed in the present case. This may be collected, for instance, from the case of *Shackleton* v. *Lord Barrymore*, which occurred here, in Hilary Term, 1798 ; and which, in substance, was as follows.

[“ It was a suit by Shackleton, a creditor, against Lord Barrymore, as administrator of his brother, the late lord, for an inventory. Lord Barrymore exhibited an inventory. The creditor then gave in an allegation, pleading *omissa* ;

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to which allegation, not only his lordship's answers were taken, but the creditor being dissatisfied with those answers, produced witnesses on the allegation who were examined to *falsify* the inventory. At the hearing of the cause, Lord Barrymore's counsel, of whom I was one, took an objection, at least, to the depositions being read; citing, among other arguments in support of the objection, this case of *Catchside* and *Ovington*. The judge, Sir William Wynne, upon mature deliberation, sustained the objection, so far as it went to the reading of the depositions; at the same time that, notwithstanding the case of *Catchside* and *Ovington*, he ordered a fuller inventory as with reference to assets, the omission of which was deducible from the answers. From a note which I took of his judgment at the time, I find that learned person to have expressed himself to the following effect:—

[“ ‘It has been argued that a creditor, not being allowed to object to an account, it is not open to him, on the same principle, to object to an inventory. Upon principle, perhaps, there is no very solid distinction between the two cases; but a distinction has always prevailed in practice; allegations in objection to *inventories* have constantly been admitted. Two cases have been cited, indeed, to the effect that the common law will not *allow inventories* to be objected to in these courts; but the reports of those cases are so short, that it is not easy to see upon what principle they proceeded. In the one of these, the case of *Hinton* and *Parker*, it is merely *said*, that the spiritual court shall not falsify an inventory at the suit of a *creditor*, though it may at the suit of a *legatee*. This is strictly all; for it is neither said, *how* the spiritual court shall not proceed to falsify an inventory at the suit of a creditor; nor is any ground for the distinction between the case of a creditor and that of a legatee, in this matter, for which there seems to be no good foundation in reason or principle, attempted to be laid. In *Catchside* and *Ovington*, the Court said, ‘On the face of the proceedings, the ecclesiastical court had no jurisdiction;’ but what the proceedings had been in that cause, does not appear from the printed report.’

[“ ‘What has been principally contended, however, is, that though the court may allow an allegation to be given in objection to an inventory, and answers to be taken upon that allegation, yet that it should go no further; that it should not permit witnesses to be examined upon the allegation, in order to *falsify* the inventory. This distinction I take to be well founded (and therefore I incline to sustain the objection, so far) for the following reason: If the answers confess more assets than were inserted in the inventory, the court may order the inventory to be amended, by the insertion of these. But what is it to do if further assets are established, by *witnesses*, in *opposition* to the answers? It cannot order them to be inserted

in the inventory, *without* the party's oath ; for the inventory is required, by the statute, to be *upon* oath. Nor can it compel the executor or administrator to swear to assets, the possession of which he has twice already, upon oath, denied. Hence, I sustain the objection taken to the depositions being read, in this case. Nor in the cases cited (or in any other that I am aware of), of depositions taken on allegations of this sort(s), does any one occur, in which the court has ordered articles to be added to an inventory, on depositions against answers ; so that the taking of such depositions at all should appear merely superfluous.

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[“ Here, then, in this case of *Shackleton v. Lord Barrymore*, there is a direct precedent for the courts proceeding in this matter, notwithstanding the case of *Catchside and Ovington* : and I think that, on the authority of that case, the court may proceed in the present ; notwithstanding the countenance which that case of *Catchside and Ovington* derives from the more recent case of *French and Henderson* ; and notwithstanding that more recent case itself, taken substantively. Further, in the present case, the party, an executrix, whose authority is derived *from* the ordinary, objecting a statute in bar of proceedings *by* the ordinary, is at least, it should seem, first bound herself to a compliance with that statute. Has she complied with the statute ? Is this such an inventory as is required by the statute ? It is certainly not, in my view of it. The executrix does not even style it an inventory, but a declaration in lieu of an inventory. She classes the effects in masses, and does not detail them, specifically—nor does she set forth by whom they were appraised—both, seemingly, required by the statute. Upon all these considerations, I think that the executrix must either write to this act, or bring in a further inventory, as prayed by the creditor.—ED.]

By the 13 Edw. 1, st. 1, c. 23, “ Executors shall have a writ of account, and the same action and process in the same writ, as the testator might have had if he had lived (*t*).”

Action given
to Executors.

By the common law, executors should not have an action of account, for an account to be made to the testator, because the account rested in privity ; for remedy whereof this action was made. But by the law of merchants, an action of account did lie for executors (*u*).

By the 4 Edw. 3, c. 7, “ Whereas in times past executors have not had actions for a trespass done to their testators, as if the goods and chattels of the same testators carried away in their life, and so such trespasses have hitherto remained unpunished ; it is enacted, that the executors in such cases shall have an action against the trespassers, and recover their da-

(s) [*Armstrong v. Caley*, 1763 ; 1771.]
Venables v. Watkins, 1766 ; *Deane v.* (t) [*Vide infra*, “ Account.”]
Crevis, 1767 ; *Griffiths v. Craven*, (u) 2 Inst. 404.

gages, in like manner as they whose executors they be should have had if they were in life."

By the 25 Edw. 3, st. 5, c. 5, "Executors of executors shall have actions of debt, accounts, and of goods carried away of the first testators, and executions of statute merchants and recognizances made in court of record to the first testator, in the same manner as the first testator should have had if he were in life; and the same executors of executors shall answer to other of as much as they have recovered of the goods of the first testators, as the first executors should do if they were in full life."

Action given
to Adminis-
trators.

By the statute of the 31 Edw. 3, st. 1, c. 11, "In case where a man dieth intestate, the persons deputed by the ordinary to administer his goods shall have an action to demand and recover as executors the debts due to the person intestate in the king's court, for to administer and dispend for the soul of the dead; and shall answer also in the king's court, to other to whom the dead person was holden and bound, in the same manner as executors shall answer; and they shall be accountable to the ordinary, as executors be in the case of testament, as well of the time past as of the time to come."

Before this act, by the common law, administrators had no property in the goods and chattels as executors had; nor could they recover debts as executors could do; but by this statute they are enabled in both those respects; and further, whereas by the common law they were charged by the name of executors, now they shall be charged by the name of administrators (x).

[By 3 & 4 Will. 4, c. 42,

3 & 4 W. 4,
c. 42.

Executors
may bring
Actions for
Injuries to
the Real Es-
tates of the
Deceased;

[Sect. 2. "And whereas there is no remedy provided by law for injuries to the real estate of any person deceased, committed in his lifetime, nor for certain wrongs done by a person deceased in his lifetime to another in respect of his property, real or personal; for remedy thereof be it enacted, That an action of trespass, or trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased for any injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person; and the damages, when recovered, shall be part of the personal estate of such person; and further, that an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased for any wrong committed by him in his lifetime to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such

and Actions
may be
brought
against Exe-
cutors for an
Injury to
Property,
Real or Per-
sonal, by their
Testator.

(x) Gibs. 478.

executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person."

[Sect. 14. "That an action of debt on simple contract shall be maintainable in any court of common law against any executor or administrator."

Simple Contract Debt.

[An executor or administrator (*y*) has the same property in the personal effects as the deceased had when living, and has the same power to bring actions to recover them.

[In *Cobbett* (executor of *Boxall*) v. *Chilton and another* (*z*), If A. has in his possession a box containing papers belonging to a person deceased, and send the box with its contents to his solicitors, with directions to deliver the box and papers to the executor, on his giving an inventory of them, and a receipt: Held, that trover lies against the solicitors, if they refuse to deliver the box and papers to the executor, he refusing to give an inventory and receipt, although the solicitors offered to give them up if the executor would give an inventory and receipt.

[An executor may commence an action before probate granted, because he derives his right from the will, although he cannot declare until probate be granted, because he cannot make profert (*a*). But an administrator ought not to commence an action before letters of administration are granted, as he derives all his authority from the testator (*b*).

[An administrator *cum testamento annexo* cannot declare before administration is granted any more than an ordinary administrator (*c*).

[No action can be maintained against a party as executor until he has taken upon himself to act as such, or has proved the will (*d*).—ED.]

By the 32 Hen. 8, c. 37, s. 1 (*e*), "Forasmuch as by the order of the common law, the executors or administrators of tenants in fee simple, tenants in fee tail, and tenants for term of life, of rent services, rent charges, rent secks, and fee farms,

32 Hen. 8, c. 37.
Action in Case of Rent in Arrear.

(*y*) [See below.]

(*z*) [2 C. & P. 471, Lord Tenterden.]

(*a*) [See also *Arry v. Robinson*, 1 N. R. 293; *Prince v. Nicholson*, 5 Taunt. 665; S. C. 1 Marsh. 280; *Riddel v. Sutton*, 5 Bing. 200; S. C. 2 M. & P. 345; *Hambly v. Trott*, Cowp. 371; *Cockerill v. Kynaston*, 4 T. R. 280; *Marshall v. Broadhurst*, 1 C. & J. 403; S. C. 1 Tyr. 348; *Davis v. Salter*, 1 Dowl. P. C. 561; S. C. 2 C. & M. 466; *Gallant v. Bouteflower*, 3 Doug. 35.]

(*b*) [*Woodridge v. Bishop*, 7 B. & C. 406; S. C. 2 M. & R. 431, n.; *Rogers v. Jones*, 7 Taunt. 147; S. C. 2 Marsh. 425; *Ex parte Paddy Buck*, 235; S. C. 3 Madd. 241.]

(*c*) [*Phillips v. Hartley*, 3 C. & P. 121, Best.]

(*d*) [*Douglas v. Forrest*, 1 M. & P. 663; S. C. 4 Bing. 686.]

(*e*) [See on this statute, Co. Litt. 162 b; *Wade v. Marsh*, 1 Roll. Ab. 672, tit. Distress (O), 13; S. C. Latch. 211.—ED.]

Executors,
&c. may have
Action, and
distrain for
Rent due to
their Testator
in his Life-
time.

have no remedy to recover such arrearages of the said rents or fee farms as were due unto the testators in their lives, nor yet the heirs of such testator, nor any person having the reversion of his estate after his decease, may distrain or have any lawful action to levy any such arrearages of rents or fee farms, due unto him in his lifetime as is aforesaid; by reason whereof the tenants of the demesne of such lands, tenements or hereditaments, out of which such rents were due and payable, who of right ought to pay their rents and farms at such day and terms as they were due, do many times retain such arrearages in their own hands, so that the executors and administrators of the persons to whom such rents or fee farms were due, cannot have or come by the said arrearages of the same, towards the payment of the debts, and performance of the will of the said testators; it is enacted, that the executors and administrators of every such person to whom any such rent or fee farm shall be due, and not paid at the time of his death, shall have an action of debt for all such arrearages, against the tenant that ought to have paid the same, or against his executors or administrators; or may distrain for the same upon the lands and other hereditaments chargeable therewith, so long as they continue in the seisin or possession of the said tenant in demesne, who ought immediately to have paid the said rent or fee farm so being behind, to the said testator in his life; or in the seisin or possession of any other person claiming the same only from the same tenant by purchase, gift, or descent; in like manner and form as the testator might have done in his lifetime, and shall for the same distress lawfully make avowry upon their matter aforesaid."

Sect. 2. "Provided that this shall not extend to any such manor, lordship or dominion in Wales, or in the marches of the same, whereof the inhabitants have used time out of mind to pay unto the lord or owner thereof at his first entry into the same, any sum for the redemption and discharge of all duties, forfeitures, and penalties, whereof the said inhabitants were chargeable to any of their said lords, ancestors, or predecessors before his said entry."

Sect. 3. "And if any man having in the right of his wife any estate in fee simple, fee tail, or for term of life, in any rents or fee farms, and the same shall be due and unpaid in the said wife's life; the husband after the death of his wife, his executors and administrators, may have an action of debt for the said arrearages against the tenant of the demesne that ought to have paid the same, his executors or administrators, or may distrain for the same, as he might have done if his wife had been living, and make avowry upon his matter as aforesaid."

Distress for a
Rent the Es-
tate whereof
dependeth

Sect. 4. "And if any person shall have any rents or fee farms for term of life of any other person, and the same shall be due and unpaid in the life of such other person, and he dieth, then

he to whom the same was due, his executors or administrators, may have an action of debt against the tenant in demesne that ought to have paid the same when it was first due, his executors and administrators; or may distrain for the same upon such lands and tenements out of which the said rents or fee farms were issuing and payable; in like manner and form as he might have done if such person by whose death the aforesaid estate in the said rents and fee farms was determined and expired had been in full life; and the avowry for the taking of the same distress to be made as aforesaid.”

upon another's Life being dead.

[Under this statute it was held that if a person seised in fee of land demised it for years, reserving rent, his executors or administrators could not distrain for arrears of rent incurred during his lifetime, on the ground that the deceased was not tenant of the rent (*f*).

[But now by statute 3 & 4 Will. 4, c. 42, it is enacted—

[Sect. 38. “That it shall be lawful for the executors or administrators of any lessor or landlord to distrain upon the lands demised for any term, or at will, for the arrearages of rent due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done in his lifetime.”

3 & 4 W. 4, c. 42.

Executors of Lessor may distrain for Arrears in his Lifetime.

[Sect. 38. “That such arrearages may be distrained for after the end or determination of such term or lease, at will, in the same manner as if such term or lease had not been ended or determined; provided that such distress be made within the space of six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due: Provided also, that all and every the powers and provisions in the several statutes made relating to distresses for rent shall be applicable to the distresses so made as aforesaid.”—*Ed.*]

Arrears may be distrained for within Six Months after Determination of Term.

And by the statute of 11 Geo. 2, c. 19, s. 15(*g*), “Whereas where any lessor or landlord, having only an estate for life in the lands, tenements, or hereditaments demised, happens to die before or on the day on which any rent is reserved or made payable, such rent or any part thereof is not by law recoverable by the executors or administrators of such lessor or landlord; nor is the person in reversion entitled thereunto, any other than for the use and occupation of such lands, tenements, or hereditaments, from the death of the tenant for life; of which advantage hath been often taken by the under-tenants, who thereby avoid paying any thing for the same; for remedy thereof it is enacted, that where any tenant for life shall happen to die before or on the day on which any rent was reserved or made payable upon any demise or lease of any lands, tenements, or hereditaments which determined on the death of such tenant for life, that the executors or administrators of such

Rents recoverable from Under-tenant, where Tenants for Life die before the Rent is payable.

(*f*) [*Prescott v. Boucher*, 3 B. & A. 849; *Jones v. Jones*, *ibid.* 967.]

(*g*) [See title *Leases*, vol. ii. 393 *a*.]

tenant for life shall and may, in an action upon the case, recover of and from such under-tenant or under-tenants of such lands, tenements, or hereditaments, if such tenant for life die on the day on which the same was made payable, the whole, or if before such day, then a proportion of such rent, according to the time such tenant for life lived of the last year, or quarter of a year, or other time in which the said rent was growing due, as aforesaid; making all just allowances, or a proportionable part thereof respectively."

In what
Courts to be
brought.

An executor may sue another in the spiritual court touching his testator's goods, in this case, viz. if a man devise or bequeath corn growing or goods unto one, and a stranger will not suffer the executor to perform the testament; for this legacy he shall sue the stranger in the spiritual court (*h*).

But if a man take from the executor or administrator the goods of the deceased, for this they must use their action of trespass, and not sue in the spiritual court: for they cannot sue for the goods of the deceased in a court ecclesiastical, but at the common law (*i*).

Also tenants may be sued at the common law by executors or administrators for rent behind, and due to the testator or intestate in his lifetime, or at the time of his death, and they may for the same distrain the land charged with the rent (*k*).

In what Case
Co-Executors
must all join.

All the executors do represent the person of the testator, and therefore they must all join in suit against others, and in suit by others they must all be made defendants, or at least so many of them as do administer; for though executors themselves must take notice by the will how many executors there be, and must frame their suit accordingly; creditors and strangers need not take notice of any more than do administer, and execute the office of executor (*l*).

Smith v. Smith (*m*), T., 6 Jac. 1. The mother and her son, an infant, were made executors, and administration was granted to her during the minority of her son; she married again, and then her husband and she as executrix brought an action of debt against the defendant, who pleaded in abatement that the infant was not named, and upon a demurrer to that plea it was held that the plea was good; but if it had been set forth specially in the declaration, that there was another executor under age, though not joined in the action, it might have been otherwise.

[But it seems that the rule is different in equity; there if one executor has alone proved, he may sue alone (*n*).—ED.]

Case where
one Co-Exec-
utor refuseth.

If one executor refuse to undertake the executorship, then is the other executor to be admitted alone, and may execute

(*h*) Swin. 18.

(*i*) Swin. 18; 10 Mod. 21. [*Vide supra*, the mode of proceeding by temerary administration.]

(*k*) Swin. 18.

(*l*) Went. 95.

(*m*) Yelv. 130; S. C. 1 Brownl. 101.

(*n*) [*Davies v. Williams*, 1 Sim. 8, (V. C. Leach.)]

the will, or commence any suit or be sued alone, as if no other had been named executor. But if he alter his mind, and afterwards become willing, then (his former refusal before the ordinary notwithstanding) he may join with the other executor who proved the will, and if he release any debt due to the testator, the release is as sufficient as if he had never refused; which is to be understood if he released before judgment; but after judgment, being no party to the suit, he cannot acknowledge satisfaction, because he was not privy to the judgment (o).

And where there are several executors, and one of them refuseth before the ordinary, and the rest prove the will; he who refused may administer when he will, and therefore they who proved it ought to name him in every action: but if they all refuse, and the ordinary grants administration to another, then it is too late, for in such case they cannot afterwards prove the will (p).

Co-executors being in law but as one person, therefore the act of one is the act of them all, and the possession of one is accounted the possession of all, and the payment of debts by or to one of them is the payment of or to all of them; and the sale or gift of the testator's goods by one is the sale or gift of all; and likewise a release before judgment of one of them, is a release of all (q).

In what Case one may do what all may do.

But it is not so with *administrators*, for they have but one authority given them by the bishop over the goods, which authority being given to many is to be executed by all of them joined together (r).

Co-Administrators.

[But in the subsequent cases of *Willand v. Fenn* and *Jacomb v. Harwood* (s), it was held, that one of several administrators stands on the same ground with one of several executors.—ED.]

Also one executor shall not be charged with the wrong or *devastavit* of his companion, and shall be no farther liable than for the assets which came to his hands. And therefore where an action was brought against two executors, and the jury found that the two and another were made executors, and that the third wasted the assets to the amount of 600*l.* and died, and that only 16*l.* came to the hands of the two others; the court held, that they should be chargeable for no more than the 16*l.*; for that it was the testator's folly to trust such a person, which must not turn to the prejudice of the other executors (t).

(o) Swin. 325.

(p) *Hensloe's case*, 9 Co. 38; *vide supra*, "Probate," [and Sugden on Powers, 6th edit. vol. i. c. 3, s. 1, § 40.]

(q) Swin. 328; [3 Bac. Abr. 30, Executors (C) 1; *Ex parte Rigby*, 19 Ves. 462.]

(r) Lord Bacon's Tracts, 162;

[*Hudson v. Hudson*, 1 Atk. 460, (Ld. Hardwicke.)]

(s) [2 Ves. sen. 267, in which case Sir J. Strange, M.R. cited *Willard v. Fenn*; see, however, *Warwick v. Greville*, 1 Phill. 126, and *Stanley v. Burnes*, 1 Hagg. 222.]

(t) 2 Bac. 395.

When one
Executor
may sue
another.

Regularly, one executor cannot sue another of his co-executors touching any thing relating to his testator's will, or that is within the power, interest, duty or office of an executor (*u*).

But if a debtor make his creditor and another person executors, and the creditor abstain from proving the will, or acting as executor, he may maintain an action against the other, for his debt due by the testator; [nor is it necessary to enable him to do so that he should renounce before the ordinary (*x*). —ED.]

But if the residue of the personal estate, after debts and legacies, be devised to both the executors, one of them may sue the other in the spiritual court for a moiety; for this is in the nature of a gift or legacy to him, and he may bring trespass against the other executor if he takes it out of his possession, or detain it if he detains it from him (*y*).

Or, in such case, he may have relief in equity.

Co-Executor
dying.

It seemeth to be now settled that where a man maketh two executors, and deviseth to them the residue of his goods after debts and legacies paid, and one of them dieth, that the survivor shall have the whole (*z*).

So where a man deviseth all the rest and residue of his goods, chattels and personal estate, to two persons, their executors and administrators, and one of them died; on a bill brought by his executor against the surviving devisee, it was held, that the survivor should take the whole to his own use, and should not be a trustee as to the moiety for the representative of him who is dead, and that they were to be considered as joint-tenants where survivorship takes place, as well in cases of chattels as in cases of inheritance (*a*).

Executor or
Administrator
of an Exe-
cutor.

The executor of an executor, (where there is no joint executor), is executor to the first testator, and hath right to all the profit, and is liable to all the charge that the first executor had, or was subject unto. But the one testator's goods shall not stand charged for the other testator's debts, but each for his own (*b*).

If two be appointed executors, and the one maketh his testament, wherein he nameth his executor, and dieth, his co-executor surviving, in this case, the executor of the executor is not to be joined with the executor surviving, neither in the execution of the will, nor in suits or actions. And if the executor of the executor have any goods or chattels in his hand which did belong to the first testator, the executor of the same testator surviving may have an action against the executor of

(*u*) 2 Bac. Abr. 396.

(*x*) *Rawlinson v. Shaw*, 3 T. Rep. 557; [*Dorchester v. Webb*, W. Jones, 557.]

(*y*) 2 Bac. Abr. 396.

(*z*) 2 Lev. 209; 1 Vern. 482.

(*a*) 1 Abr. Cas. Eq. 243; 12 Ves. 298. [See Sugden on Powers, 6th ed. vol. i. p. 138, *Where the surviving or acting Executors can sell.*—Ed.]

(*b*) Swin. 329.

the executor for the same; for the power of the executor who died first was determined by his death, the other then surviving (c).

Executor or Administrator of an Executor.

Swinburne says (d), the executor of an executor cannot sell the lands of the first testator.

But in the case of *Rolls v. Mason* (e), T., 10 Jac. 1, where the devise was, that the executor should sell, it was held, that the executor of the executor might sell, though not in being at the time of the devise.

So in the case of *Garfoot v. Garfoot* (f), M., 15 Car. 2. Lands were devised to be sold by the executor; the executor died; the youngest children, for whose benefit the sale was ordered, preferred a bill against the heir. The heir demurs, because it was but an authority in the executor which is dead with him. But the demurrer was overruled.

But the *administrator* of an executor is not liable; as in the case of *Tucker v. Towel* (g), M., 9 Geo. 2. There was a libel in the spiritual court for a legacy. The defendant pleaded that it was a legacy given by the will of the testator, whose executor is dead, and he the defendant is administrator of the executor, and therefore is not liable for the legacies. Which plea the spiritual court refused, and therefore he applies for a prohibition. By Lord Hardwicke, Chief Justice: "No doubt but the spiritual court hath a general jurisdiction in suits for legacies, but the question is, Whether they have in this suit as it is now brought? And I think they have not. For if an executor dies intestate, there is no privity between his administrator and the testator, and in order to continue the privity, there are administrations *de bonis non* granted, which is the constant course. Now here is a suit against the administrator of the executor, who is not administrator *de bonis non* of the first testator, so that there is no privity. But it is said, that here is what amounts to an allegation that this administrator was possessed of the testator's goods, and so may be charged as executor of his own wrong. That doth not appear. But suppose it had been so, that would not be a ground to maintain this suit, but in that case there should be an administrator *de bonis non* set up, and he might then call him to an account in a court of equity; for the ecclesiastical court has only jurisdiction to compel the immediate representative of the testator or intestate to administer, and have power to grant probate, and to commit administration. But when they have done that, they are *functi officio*, and have no further jurisdiction, but to call the executor or administrator to account." And a prohibition was granted.

(c) Swin. 324, 325.

(d) Swin. 329.

(e) 2 Brownl. 194.

(f) [1 Cha. Ca. 195. See Sugden

on Powers, 6th edit. vol. i. c. 3, s. 1, § 30 and 46.—ED.]

(g) Cases in the time of Lord Hard-

wicke, 185.]

Administra-
tor dying.

If administration is granted to two, and one dies, yet the administration doth not cease; for it is not like a letter of attorney to two, where by the death of one the authority ceaseth; but is rather an office, and administrators are enabled to bring actions in their own names; they come in the place of executors, and therefore the office survives (*h*).

Executor of
an Adminis-
trator.

When an administrator hath judgment and dieth, his executors, as such, may not sue execution of the said judgment; for none shall have execution of this judgment but he who shall be subject to the payment of the debts of the first intestate (*i*).

Administra-
tor *de bonis*
non.

By the statute of the 17 Car. 2, c. 8, "Where any judgment after verdict shall be had, by or in the name of any executor or administrator, in such case an administrator of goods not administered may sue forth a *scire facias*, and take execution upon such judgment.

[An administrator *de bonis non* succeeds to all the legal rights which belonged to the former executor or administrator in his representative character (*k*).—ED.]

Actions
brought
against divers
Executors.

By the 9th Edw. 3, stat. 1, c. 3, "In a writ of debt brought against divers executors, they nor any of them shall have but one essoin before appearance, that is to say, at the summons or attachment; nor after appearance they shall have but one essoin, as the testator should have had; so that all the executors do represent the person of the testator as one person.

"And though the sheriff do answer at the summons, that some of them have nothing whereby he may be summoned, yet there shall be an attachment awarded upon them. And if the sheriff answer, that he hath nothing whereby he may be attached, the great distress shall be awarded; so that at the great distress returned upon them, he or they that do first appear in the court shall answer to the plaintiff. And although some of them have appeared in the court, and make default at the day that great distress is returned upon the other, yet nevertheless he or they shall be put to answer that first appeared at the great distress returned.

"And in case the judgment pass for the plaintiff, he shall have his judgment and execution against them that have pleaded, according to the law heretofore used, and against all other named in the writ, of the goods of the testator, as well as if they had all pleaded. And it is to be understood, that if any in such case will sue according to the law that hath been used heretofore, he may freely do it notwithstanding this statute (*l*)."

[Executors *formerly* were not liable to costs for an action brought for a wrong done in the time of the deceased or upon a contract made with him.—ED.]

(*h*) [*Adams v. Buckland*, 2 Vern. 514; 3 Bac. Abr. 56, title Executors (*G*); 2 Bla. Com. 506; *Hudson v. Hudson*, Cas. temp. Talbot, 127.]

(*i*) 5 Co. 9, *Brudenel's case*.

(*k*) [*Catherwood v. Chabaud*, 1 B. & C. 154, Bayley, J.]

(*l*) [*Vide supra*, 3 & 4 Will. 4, c. 42, s. 4, for the last enactment on this subject.—ED.]

In all actions brought by executors or administrators upon contracts, bonds, or other things made to the deceased, or for goods taken away in his life, they shall pay no costs by any statute (*m*). Costs.

That is to say, costs by the common law are not given in any case; and executors and administrators are not comprised within the several statutes (*n*) which, in order to prevent vexatious suits, do require other persons to pay costs in like cases; for executors and administrators cannot so well be supposed to intend vexation, seeing that they sue only in the right of another, and have not perhaps so perfect a knowledge of the matter as their testator or intestate would have had if he had lived. But as they are not to pay costs, so on the contrary they are not to be allowed costs; because they are supposed to reimburse themselves any charges or expenses they may have been at in the account of the testator's or intestate's estate (*o*).

So also an executor defendant shall pay costs; and the judgment is of the goods of the testator, if there are sufficient; if not, of the executor's own goods. Also when he is defendant, and there is judgment for him, he shall have his costs (*p*).

(*m*) Law of Ex. 462; 2 Bac. Abr. 446.

(*n*) [23 Hen. 8, c. 15, s. 1, enacts, "That if any person or persons, at any time after the feast of the Purification of our Lady, in the twenty-third year of the reign of our sovereign lord king Henry the Eighth, commence or sue in any court of record, or elsewhere in any other court, any action, bill, or plaint, of trespass upon the statute of King Richard the Second, made in the fifth year of his reign, for entries into lands and tenements, where none entry is given by the law, or any action, bill, or plaint of debt or covenant, upon any specialty made to the plaintiff or plaintiffs, or upon any contract supposed to be made between the plaintiff or plaintiffs and any other person or persons, or any action, bill, or plaint of detinue of any goods or chattels, whereof the plaintiff or plaintiffs shall suppose that the property belongeth to them, or to any of them, or any action, bill, or plaint of account, in the which the plaintiff or plaintiffs suppose the defendant or defendants to be their bailiff or bailiffs, receiver or receivers of their manor, mese, money, or goods, to yield account; or any action, bill, or plaint upon the

case, or upon any statute, for any offence or wrong personal immediately supposed to be done to the plaintiff or plaintiffs; and the plaintiff or plaintiffs in any such kind of action, bill, or plaint, after appearance of the defendant or defendants, be nonsuited, or that any verdict happen to pass, by lawful trial, against the plaintiff or plaintiffs in any such action, bill, or plaint, that then the defendant or defendants in every such action, bill, or plaint, shall have judgment to recover his costs against every such plaintiff or plaintiffs; and that to be assessed and taxed by the discretion of the judge or judges of the court where any such action, bill, or plaint, shall be commenced, sued, or taken; and also that every defendant in such action, bill or plaint, shall have such process and execution for the recovery and having of his costs against the plaintiff or plaintiffs, as the same plaintiff or plaintiffs should or might have had against the defendant or defendants, in case that judgment had been given for the part of the said plaintiff or plaintiffs, in any such action, bill, or plaint."—Ed.]

(*o*) 2 Atk. 108.

(*p*) 1 Bac. Abr. 517; 2 Bac. Abr. 446.

Marsh v. Yellowly, H., 12 Geo. 2 (q). When an executor must declare as executor, he shall pay no costs; but if the cause of action ariseth in the time of the executor, and is therefore a matter within his knowledge, and for which he may declare in his own right, and need not to declare as executor, he shall be liable to pay costs.

So where the thing in dispute is matter not of fact but of law, and consequently as much within the knowledge of the executor or administrator as of the testator or intestate, it hath been adjudged, that where judgment is given against the executor or administrator upon demurrer, they shall pay costs. As in the case of *Frazer v. Moore*, E., 1720 (r). Bill by an administrator: the defendant demurs, and the demurrer is allowed, and the bill is dismissed with costs; and so said to be the constant course in equity by the whole Court of Exchequer.

Elwell v. Quash and others, M., 3 Geo. 1 (s). There were three executors, one of whom gave a warrant of attorney to confess a judgment against himself and his co-executors; pursuant to which a judgment was entered against all the executors of the goods of the testator for the debt, and against the executor who gave the warrant of his own goods for the costs. Upon motion to set this aside, it was held to be ill; for executors may plead different pleas, and that which is most for the testator's advantage shall be received. And the judgment was set aside.

Crutchfield v. Scott, E., 1 Geo. 2. The question was, whether in an action by an executor the defendant should be allowed to *bring money into court*. And on consideration, it was held he might, and that the effect of it would be, not to make the executor pay, but only lose his subsequent costs. And the same was allowed in the case of *Baker v. Turberville*, M., 3 Geo. 1 (t).

Caswell v. Norman, T., 7 Geo. 2 (u). An executor brought *error* of a judgment after a *devastavit*; and the court held, he ought to pay costs on affirmance.

Harris v. Jones, H., 4 Geo. 3 (x). On a question whether an executor should be permitted to *discontinue*, without payment of costs. For the plaintiff executor it was urged that an executor should not pay costs in any instance excepting one, namely, where he had brought an action as executor, which he might have brought in his own name. But by the court, the giving an executor leave to *discontinue*, is matter of discretion in the court; and they ought not to give him such leave

(q) Str. 682, 1106.

(r) Bunb. 63.

(s) Str. 20.

(t) Str. 796.

(u) Str. 977.

(x) Bur. Mansf. 1451.

in any case where he hath knowingly brought his action wrong, Costs. unless he will consent to pay costs.

Also on a judgment of *non prosequitur* for the executor's wilful delay, he shall pay costs (*y*).

But he shall not pay costs on a nonsuit (*z*).

[And various other cases established that executors and administrators should not pay costs upon a nonsuit or verdict for an action brought for a wrong done in the time of the deceased, or for a contract entered into by him. But now, by stat. 3 & 4 Will. 4, c. 42, s. 31, it is enacted,

["That in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall, unless the court in which such action is brought, or a judge of any of the said superior courts, shall otherwise order, be liable to pay costs to the defendant in case of being nonsuited or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner (*a*)."—ED.]

Executors
suing in right
of the Tes-
tator to pay
Costs.

Bankruptcy does not take away an executor's right to the executorship; but in order to secure the effects for the creditors and legatees, the Court of Chancery will appoint a receiver, to whom the assignees of the commission shall account for what they have received of the testator's goods (*b*); or will admit the bankrupt a creditor against his own estate for what he claims as executor, and order the money to be paid into the Bank (*c*); excepting such beneficial interest as vests in the bankrupt himself (*d*). Where the bankrupt and another were executors of a creditor of the bankrupt, the court permitted the co-executor to prove the debt under the commission, and ordered the money to be paid into the Bank, although it appeared that the will was contested by the bankrupt in the ecclesiastical court, on the ground of a former will, by which he was sole executor and residuary legatee; and it was objected that administration might be had *pendente lite* (*e*).

Executor
Bankrupt.

(*y*) Bur. Mansf. 1584; [*Higgs v.* vol. ii. p. 1492.]
Warry,] 6 T. Rep. 654.

(*z*) Ibid.

(*a*) [For the construction put by courts of common law on this statute, see V. Williams on Exor. and Adm. 198.]

(*b*) [*Ex parte Ellis*,] 1 Atk. 101.

(*c*) [*Ex parte Leeke*,] 2 Bro. 596.

(*d*) [*Robinson v. Taylor*,] Id. 589.

(*e*) [*Ex parte Shakeshaft*,] 3 Bro.

198. [*Vide supra*, p. 156.]

VII. *Of the Payment of Debts by Executors or Administrators.*

The King
first Creditor.

By the statute of Magna Charta, chap. 18 (which Lord Coke says is in affirmance of the common law), "Where one indebted to the king shall die, the king shall be first satisfied for his debt, and the residue shall remain to the executors to perform the testament of the dead: and if nothing be owing unto the king, all the chattels shall go to the use of the dead (saving to his wife and children their reasonable part.)"

Ordinary
liable.

Upon which Lord Coke says, three things are to be observed: 1. That the king by his prerogative shall be preferred in satisfaction of his debt by the executors before any other. 2. That if the executors have sufficient to pay the king's debt, the heir that is to bear the countenance and sit in the seat of his ancestor, or any purchaser of his lands, shall not be charged. 3. If nothing be owing to the king or any other, all the chattels shall go to the use of the dead, that is, to his executors or administrators, saving their reasonable parts to the wife and children as aforesaid.

And by a constitution of Othobon (*f*), "Since the uncertainty of death often deprives men of the opportunity of making their last wills, human piety acteth mercifully towards the deceased, by distributing their goods to pious uses, so that they follow and help them, and propitiously intercede for them with the Heavenly Judge; therefore we, by our approbation, confirming the provisions heretofore made (as it is said) by the prelates of the kingdom of England, with the approbation of the king and barons, concerning the goods of such as die intestate, do strickly forbid prelates and all other whatsoever to take or seize the goods of intestates, contrary to the provision aforesaid."

Which provision John of Athon understandeth to be that which is made by the statute of the 13 Edw. 1, c. 19; but this cannot be right, for this constitution was made seventeen years before that statute (*g*). But the provision meant seemeth plainly to be the aforesaid statute in the Magna Charta.

And by a constitution of Archbishop Stratford (*h*), it is ordered thus: "Forasmuch as it happeneth sometimes that persons dying intestate, the lords of the fees do not permit the debts of the deceased to be paid out of their moveable goods, we do decree that none shall henceforth do the same on pain of the greater excommunication.

Executors
and Adminis-
trators liable.

2. By the statute of the 31 Edw. 3, st. 1, c. 11, "The persons deputed by the ordinary to administer the goods of

(*f*) Athon, 121.

(*g*) Gibs. 478.

(*h*) Lind. 171.

intestates shall have an action to demand and recover as executors the debts due to the person intestate in the king's court, for to administer and dispend for the soul of the dead; and shall answer also in the king's court to other to whom the said dead person was holden and bound, in the same manner as executors shall answer: and they shall be accountable to the ordinaries as executors be in the case of testament, as well of the time past as the time to come."

But before this act, action laid by the common law against the deputies or committees of the ordinary, by the name of executors, but not by the name of administrators, until this act (i).

By the statute of the 30 Car. 2, c. 7, "The executors and administrators of any person who as executor in his own wrong, or administrator, shall waste or convert any goods, chattels, estate or assets of any person deceased, to his own use, shall be liable and chargeable in the same manner as their testator or intestate would have been if he had been living."

And by the statute of the 4 & 5 W. & M. c. 24, s. 12, "Forasmuch as it hath been a doubt whether the said statute of the 30 Car. 2, did extend to the executors and administrators of any executor or administrator of right, who for want of privity in law were not before answerable nor could be sued for the debts due from the first testator or intestate, notwithstanding that such executors or administrators had wasted the goods and estate of the first testator or intestate, or converted the same to their own use; it is hereby declared, that all and every the executors or administrators of such executor or administrator of right, who shall waste or convert to their own use goods, chattels or estate of their testator or intestate, shall be liable and chargeable in the same manner as their testator or intestate should or might have been (k)."

Dr. Swinburne says (l), "If a testator by his testament doth charge his executor to pay his debts, the creditors in respect of such charge may sue for them in the ecclesiastical court."

But this (as it seemeth) must be understood where there are special words in the will so directing it; as if the testator leave to his creditor such a sum in lieu and satisfaction of his debt, or the like; otherwise the suit must be (as for other debts) in the temporal courts.

[At common law the devisee was not liable to debts when the descent was broken, and, except under very particular circumstances, the same rule guided courts of equity. In order to make devised estates liable to specialty debts, the statute of 3 W. & M. c. 14, was passed, the provisions of which

Devisee or
Heir at Law
of Lands
liable (m).

(i) 9 Co. 39.

(l) Swin. 19.

(k) [Hammond v. Gatcliffe, Andr. 254.]

(m) [See Galton v. Hancock, 2 Atk. 426, on 3 & 4 W. & M. c. 14.]

11 Geo. 4 &
1 Will. 4,
c. 47.

Recited Acts
repealed.

For remedy-
ing Frauds
committed on
Creditors by
Wills.

Enabling
Creditors to
recover upon
Bonds, &c.

have been lately repealed, but re-enacted with additional strength by 11 Geo. 4 & 1 Will. 4, c. 47, which enacts,

[Sect. 1. " That the said several recited acts shall be and the same are hereby repealed, but so as not to affect any of the provisions and remedies of the said acts, or any of them, to the benefit of which any persons are entitled, as against any estate or interest in any lands, tenements, hereditaments, or other real estate, of any person or persons who died before the passing of this act."

[Sect. 2. " And whereas it is not reasonable or just that by the practice or contrivance of any debtors their creditors should be defrauded of their just debts, and nevertheless it hath often so happened, that where several persons having by bonds, covenants, or other specialties bound themselves and their heirs, and have afterwards died seised in fee simple of and in manors, messuages, lands, tenements, and hereditaments, or had power or authority to dispose of or charge the same by their wills or testaments, have, to the defrauding of such their creditors, by their last wills or testaments, devised the same or disposed thereof in such manner as such creditors have lost their said debts; for remedying of which, and for the maintenance of just and upright dealing, be it therefore further enacted, that all wills and testamentary limitations, dispositions, or appointments, already made by persons now in being, or hereafter to be made by any person or persons whomsoever, of or concerning any manors, messuages, lands, tenements, or hereditaments, or any rent, profit, term, or charge out of the same, whereof any person or persons, at the time of his, her, or their decease, shall be seised in fee simple, in possession, reversion, or remainder, or have power to dispose of the same by his, her, or their last wills or testaments, shall be deemed or taken (only as against such person or persons, bodies politic, or corporate, and his and their heirs, successors, executors, administrators, and assigns, and every of them, with whom the person or persons making any such wills or testaments, limitations, dispositions, or appointments shall have entered into any bond, covenant, or other specialty binding his, her, or their heirs), to be fraudulent, and clearly, absolutely, and utterly void, frustrate, and of none effect; any pretence, colour, feigned or presumed consideration, or any other matter or thing to the contrary notwithstanding."

[Sect. 3. " And for the means that such creditors may be enabled to recover upon such bonds, covenants, and other specialties, be it further enacted, that in the cases before mentioned every such creditor shall and may have and maintain his, her, and their action and actions of debt or covenant upon the said bonds, covenants, and specialties against the heir and heirs at law of such obligor or obligors, covenantor or covenantors, and such devisee and devisees, or the devisee or devisees of such first-mentioned devisee or devisees jointly, by virtue of this act; and such devisee and devisees shall be liable and chargeable for a false plea by him or them pleaded, in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands or tenements to him descended."

[Sect. 9. "That from and after the passing of this act, where any person being, at the time of his death, a trader, within the true intent and meaning of the laws relating to bankrupts, shall die seised of or entitled to any estate or interest in lands, tenements, or hereditaments, or other real estate, which he shall not by his last will have charged with or devised subject to or for the payment of his debts, and which would be assets for the payment of his debts due on any specialty in which the heirs were bound, the same shall be assets to be administered in courts of equity for the payment of all the just debts of such persons, as well debts due on simple contract as on specialty; and that the heir or heirs at law, devisee or devisees of such debtor, and the devisee or devisees of such first-mentioned devisee or devisees, shall be liable to all the same suits in equity, at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as they are liable to at the suit of creditors by specialty in which the heirs were bound: provided always, that in the administration of assets by courts of equity, under and by virtue of this provision, all creditors by specialty, in which the heirs are bound, shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty, in which the heirs are not bound, shall be paid any part of their demands (n)."]

Traders Estates shall be Assets to be administered in Courts of Equity.

Creditors by Specialty to be paid first.

[And by 3 & 4 Will. 4, c. 104 (the object of which act is that "the payment of the debts of all persons shall be secured more effectually"), it is provided,

["That from and after the passing of this act, when any person shall die seised of or entitled to any estate or interest in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, which he shall not by his last will have charged with or devised subject to the payment of his debts (o), the same shall be assets to be administered in courts of equity for the payment of the just debts of such persons, as well debts due on simple contract as on specialty; and that the heir or heirs at law, customary heir or heirs, devisee or devisees of such debtor, shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs at law, devisee or devisees of any person or persons who died seised of freehold estates was or were before the passing of this act liable to in respect of such freehold estates at the suit of creditors by specialty in which the heirs were bound: provided always, that in the administration of assets by courts of equity under and by virtue of this act all creditors by specialty in which the heirs are bound shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty in which the heirs are not bound shall be paid any part of their demands."—Ed.]

Freehold and Copyhold Estates in all Cases to be Assets for the Payment of Simple Contract or Specialty Debts.

(n) [See *Keene v. Riley*, 3 Meriv. 436; *Kitchen v. Bennet*, 4 Madd. 180, as to section 2 of 47 Geo. 3, c. 74, repealed. See *Spackman v. Timbrell*, 3 Sim. 253, for the construction put by the present Vice Chancellor on the repealed acts 3 W. & M. c. 14, and 47 Geo. 3, sess. 2, c. 74.]

(o) [*Ball v. Harris*, 4 My. & Cr. 268.]

The general rule is, that the personal estate shall be first charged with payment of debts and legacies (*p*). But if a creditors' debt be of a nature which binds both real and personal estate, he may resort either to the personal estate in the hands of the executor or administrator, or to the real estate in the hands of the devisee (*q*).

Liability of
Hæres natus.

Buckley v. Nightingale, M., 12 Geo. 1 (*r*). An heir that hath lands by hereditary descent, shall not be liable for the debt of his ancestor further than to the value of the lands descended: and as soon as he hath paid his ancestor's debts to the value of the land, he shall hold the land discharged; otherwise he might be chargeable *ad infinitum*.

And if an heir is sued upon a bond debt of his ancestor, in which he is bound, and he pays the money; the executor shall reimburse him as far as there are personal assets of the testator's come to his hands, if it is not otherwise ordered by the will (*s*). And his right accrues to the *hæres factus*, the general (*t*) or particular (*u*) devisee, as well as to the *hæres natus*, or heir at law.

So if a man mortgages land, and covenants to pay the money, and dies, the personal estate of the mortgagor shall, in favour of the heir, be applied to exonerate the mortgage (*x*).

Yea, though there be no covenant in the deed for the payment of the mortgage-money, yet the personal estate shall be liable in the hands of the executor (*y*).

If a man dies indebted by bond, and seised in fee of divers lands, part of which he devises to one, and other part he permits to descend to his heir (not mentioning them in his will); the lands permitted to descend shall be first applied to pay the bond debts. And the reason is, because the applying the devised lands to pay the bond debts would disappoint the will; which equity will not permit, if it can be avoided: whereas it no way disappoints the will to say, that the lands not mentioned should be in the first place liable to pay the debts. But it seems it would be otherwise, if the testator had devised the lands to his heir at law; for though such devise were void (as to the purpose of making the heir take otherwise than by descent), yet it shows the testator's intent, that the heir should have the land; and therefore it seemeth that the lands devised to one, and the other lands devised to the heir at law, should in such case contribute in proportion to pay the bond

(*p*) *Vide supra*, p. 339.

(*q*) [*Galton v. Hancock*, 2 Atk. 426; *S. C.* Ridgw. Cases temp. Hardwicke, 312; *Davies v. Churchman*, 3 Lev. 189.]

(*r*) Str. 665.

(*s*) 1 Cha. Ca. 74; *Armitage v. Metcalfe*, 2 P. Will. 175.

(*t*) [*Lutkins v. Leigh*, Cas. temp. Talbot, 54; *Galton v. Hancock*, 2 Atk. 436.]

(*u*) [*Popley v. Popley*, 1 Vern. 96.]

(*x*) *Cope v. Cope*, 2 Salk. 449.

(*y*) *Ibid.*; and 1 Vern. 436.

debts. Also, for the above-mentioned reason, it seemeth that the lands permitted to descend to the heir at law, and not mentioned in the will, shall be applied to pay the bond debts, before a *specific legacy*; lest otherwise the testator's intention should be disappointed (z).

Liability of
Hæres natus.

So where lands, upon which there was a mortgage, were devised to one, and other lands descended to the heir at law, it was decreed by the Lord Chancellor Hardwicke, upon great deliberation, that where the personal estate is insufficient to discharge the incumbrance, the ultimate fund is the land descended to the heir at law: and although the creditor may come upon which fund he pleases, yet if he proceeds against the lands mortgaged, the devisee may have his remedy over against the heir at law; otherwise the mortgage might exhaust the whole lands devised, and there would be no benefit in the will to the devisee (a). And it will make no difference that the devise is of the lands subject to the incumbrance thereon, for such a qualification is no more than what is implied, since the testator could not devise them otherwise (b).

How far a charge upon lands for payment of debts shall enure and be in force against purchasers of those lands from the devisee for a valuable consideration, hath been made a question. As in the case of *Elliot v. Merryman*, E. 1740. Thomas Smith became indebted to several persons by bond, and likewise by simple contract. In three of these bonds, Goodwin was bound with him as surety; and afterwards Goodwin gave his own bond alone to one of the creditors, to whom Smith was bound in a single bond. Smith being thus indebted made his will, and in the beginning of it says, "My will is, that all my debts be paid; and I do charge all my lands with the payment thereof." After which, by another clause in the said will, he gave "all his real and personal estate to Goodwin, to hold to him, his heirs, executors, administrators, and assigns, chargeable nevertheless with the payment of all his debts and legacies." Of this will he made Goodwin executor. The testator died in 1724. Goodwin proved the will; and in that same year sold a freehold estate of the testator's to Hunt; in the year following sold a leasehold of the testator's to White; and in 1727 sold another estate of the testator's, consisting of both freehold and leasehold, to Merriman. In the several deeds by which these estates were conveyed from Goodwin to the purchasers, the will of Smith was recited; and to one of those deeds Elliot, a creditor of Smith, was a subscribing

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Semle, it will be no Restriction of the Executor's general Power of Disposal, though the personal Estates be given on Trust.

(z) 3 P. Will. 367.

(a) [*Galton v. Hancock*, 2 Atk. 424—439; *Howell v. Price*, 1 P. Wms. 292; *Cope v. Cope*, 2 Salk. 449; *Johnson v. Milksopp*, 2 Vern. 112.]

(b) [*Serle v. St. Elory*, 3 P. Wms. 386; *Bickham v. Cruthwell*, 3 M. & C. 769; *Wythe v. Henniker*, 2 M. & K. 635.]

(c) [*Barnard*. Cha. Ca. 78; S. C. 2 Atk. 41.]

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Merriman.

Semble, it will be no Restriction of the Executor's general Power of Disposal, though the personal Estates be given on Trust.

witness. These lands were sold in the neighbourhood by public auction. At the time of these sales, the creditors all of them either lived in the town where Goodwin lived, or within three or four miles of it. During all this time, and till the year 1730, the creditors went on regularly receiving their interest, which was at 5*l.* per cent., of Goodwin. Goodwin was a solvent man till 1732, and then he became a bankrupt. In 1734, the creditors of Smith brought their bill against the purchasers of these lands, against Goodwin, and against the assignees under his commission of bankruptcy, in order to have a satisfaction of their debts out of those lands which were sold by Goodwin. By the Master of the Rolls: It is almost impossible to make a determination in the present case, but that it must fall out unfortunately on the one party or the other. The dispute arising between creditors on the one side, and purchasers on the other, both these sorts of persons are entitled to the favour of this court; and in the present case, a misfortune must fall upon one of them. On whom it is to fall, is the question. And this is a question that must so frequently have happened, that it is extraordinary to find no determination directly in point. The case is this: Smith being possessed of a real and personal estate, was indebted to several persons by bond; in three of which bonds, Goodwin was bound with him as surety; and he had contracted likewise some other debts; and being thus indebted he makes his will, and charges his real and personal estate with the payment of his debts and legacies, and makes his devisee executor. It is true indeed, the words in the will do not amount to a devise of the lands to be sold for payment of the debts; and they only import a charge upon them for that purpose. However, this is such a devise as is within the meaning of the proviso of the statute of fraudulent devises, and does interrupt the descent to the heir at law. The testator died in 1724. Goodwin paid interest for the debts regularly till 1730. After the testator's death, three sales of this estate were made by Goodwin; one, of an estate which was entirely freehold; another, of an estate entirely leasehold; and a third, consisting of freehold and leasehold both. The bill in general is brought by the creditors of Smith against the purchasers, in order to have a payment of their debts out of the lands of Smith, which were sold to them by Goodwin. With regard to the *leasehold* estate, the case is so extremely plain that the sale of that must stand, and that the creditors cannot have satisfaction out of it, that it can admit of no manner of doubt. The executors are the proper persons that by law have a power to dispose of a testator's personal estate. It is indeed true, that personal estate may be clothed with such a particular trust, that it is possible the court in some cases may require a purchaser of it to see the money rightly

applied (*d*). But unless there is some such particular trust, or a fraud in the case, it is impossible to say but the sale of the personal estate, when made by an executor, must stand; and that after the sale is made, the creditors cannot break in upon it.—I will now consider the other sales that have been made, and will examine them, first, upon the general rules of the court; and in the next place, upon the particular circumstances which this case is attended with. With regard to the first of these matters, the general rule is, that if a trust directs that land should be sold for the payment of debts generally, the purchaser is not bound to see that the money be rightly applied. On the other hand, if the trust directs that land should be sold for the payment of certain debts, mentioning in particular to whom those debts were owing; the purchaser is bound to see that the money be applied for the payment of those debts. The present case indeed does not fall within either of these rules; because here lands are not given to be sold for payment of debts, but are only charged with such payment. However, the question is, whether that circumstance makes any difference: and I think it doth not. And if such a distinction were to be made, the consequence would be, that whenever lands are charged with the payment of debts generally, they could never be discharged of that trust without a suit in this court; which would be extremely inconvenient. No instances have been produced to show, that in any other respect the charging lands with payment of debts differs from the directing them to be sold for such a purpose; and therefore there is no reason that there should be a difference established in this respect. The only objection that seemed to be of weight with regard to this matter is, that where lands are appointed to be sold for the payment of debts generally, the trust may be said to be performed as soon as those lands are sold; but where they are only charged with the payment of debts, it may be said that the trust is not performed till those debts are discharged. And so far indeed is true, that where lands will be charged with the payment of annuities, those lands will be charged in the hands of the purchaser; because it was to the very purpose of making the lands a fund for that payment, that it should be a constant and subsisting fund: but where lands are not burdened with such a subsisting charge, the purchaser ought not to be bound to look to the application of the money. And that seems to be the true distinction.—Having thus considered the case under the general rule, I will now consider it under the particular circumstances that attend it. And the particular circumstances are such as are far from strengthening the plaintiff's case, but rather the contrary. One of those circumstances is, the length of time the plaintiffs have lain by, without at all insisting on any charge upon these estates. Good-

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(*d*) [See Mr. Roper's Remarks, *infra*.]

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win was a solvent man till his bankruptcy in 1732. Here have been three purchases of these estates, made at different times: one in 1724; another in 1725; and the third in 1727. The first of them was made by Hunt, the second by White, and the third by Merriman. During all these transactions, the plaintiffs do not mention one word of their charge upon this estate; but on the contrary, regularly received their interest of Goodwin, till the year 1730. It is true indeed, that there is no express proof, that the plaintiffs knew of these purchases, but there is reason to imagine that they did. The purchases were made in the neighbourhood by public auction. Some of the creditors lived in the same town that Goodwin did; and all of them lived within three or four miles of him. And Elliott, one of the creditors, was a subscribing witness to one of the purchase deeds. The want of notice too, on the part of the purchasers, is a considerable circumstance in their favour. It is indeed true, that they had notice that there were debts chargeable on this estate; but it does not appear they knew to whom those debts were owing. Another circumstance is, that Goodwin was a co-obligor in three of these bonds, and to another of the obligees he afterwards gave his bond alone, which may well be considered as a satisfaction for that bond. By this it appears that the creditors greatly relied upon Goodwin for their paymaster; and there is not much reason, therefore, that they should now be allowed to resort to the testator's estate. Upon the whole, I am of opinion that the plaintiff's bill must be dismissed, and even with costs, as against White; there being no manner of pretence for the plaintiffs to come upon that estate, it being all leasehold, and sold to White by the executor, who by law is the proper person intrusted to dispose of the testator's personal estate. However, with regard to the rest of the defendants, I will only dismiss the bill generally, without costs.—And so it was decreed.

Power of
Executors to
sell or pledge
the Assets.

[“Thus in *Elliot v. Merriman* (e), according to Barnardiston's Reports, it is said by the Master of the Rolls, ‘that personal estate may be clothed with such a particular trust, that it is possible the Court of Chancery in some cases may require a purchaser to see the money rightly applied;’ a declaration approved, as it seems, by Lord Kenyon, M.R., in *Bonney v. Ridgard* (f). But such a trust has not yet occurred and received the stamp of judicial authority. It is indeed difficult to conceive how such a trust could be framed to produce the effect supposed to belong to it; for whatever be the trust declared of the personal estate, the executor must first take it in that character to pay the testator's debts, and then, as incident to such obligation, he must have the power of disposition over the assets. He may, therefore, sell or pledge them, and the purchaser or

(e) [Barnard. Rep. 81.]

(f) [4 Bro. C. C. 130; 1 Cox, 145.]

mortgagee in dealing with him is under no necessity of providing that his money shall be applied to the purposes of the will, the administration of the fund belonging *ex officio* to the executor. It being settled that the purchaser or mortgagee is not required to see his money appropriated in the discharge of debts, nor to examine whether there be any or not, the possibility of their existence at the period of the transaction (although all of them may have been satisfied without his knowledge), will support his title under the executor. If then the purchaser or mortgagee be not obliged to take care that the money is applied in payment of debts, it would be unreasonable to require him to look further, and to make him responsible for neglecting to see the money appropriated according to the trusts of the will, whether they be engrafted upon his office as the executor, or the personal estate be bequeathed to another person upon those trusts; the legal interest in each case continuing in the executor until all the debts be paid; and there appears to be no more reason in those cases to permit the *cestui que trusts* to follow the assets in the hands of the purchaser or mortgagee, when the executor has misapplied the money, than in ordinary cases, in which we have seen that claim to be inadmissible to general and specific legatees.

Power of
Executors to
sell or pledge
the Assets.

[“ Lord Hardwicke expressed his opinion to the above effect in *Mead v. Orrery* (g), a case in which the testator devised to his executors, and their heirs, &c. all his residuary real and personal estates in trust to pay debts, with a direction to make equal division of the surplus among his five children. One objection taken to a mortgage made by the executors was, that they were to be considered *trustees*, and that the whole of the testator’s personal estate was affected by the trusts, which rendered it necessary for a purchaser or mortgagee to see not only that the money was properly applied, but that the transaction was such as was authorized by the trusts, notwithstanding the general power of executors to dispose of the assets in payment of debts in the absence of an express trust, and the safety of a purchaser or mortgagee in taking the property from them without attending to their application of his money; the trust in the present case being (as it was insisted) an exception to the rule. But Lord Hardwicke was of a different opinion, judiciously observing, that the *manner* of devising did not alter or restrain the power of executors over the personal estate, and that the substance of the bequest was only an appointment of executors, with a gift to them of the surplus fund to be divided among the children (h).

[“The case of *Elliot v. Merriman* (i), in which the Master of the Rolls expressed himself as before mentioned in regard to the possibility of creating a *trust* of personal estate, which

(g) [3 Atk. 235, 239.]

(i) [2 Atk. 42; Barnard. 78, 81.]

(h) [See 17 Ves. 167.]

Power of
Executors to
sell or pledge
the Assets.

might impose upon a purchaser or mortgagee the necessity of attending to the application of the money, contains an opinion hardly to be reconciled with the other pronounced by him in his judgment; for that was a case where the testator devised his personal estate, together with his real, to the executor, absolutely *charged*, (equivalent to a trust), with the payment of debts and legacies. And yet that charge or trust did not appear to the Master of the Rolls sufficient to render it necessary for a purchaser of part of the assets, consisting of leasehold property, to see to the application of the purchase money. His Honor said, 'that as to the leaseholds, they are out of the case; for if a man purchase such an estate from an executor, the trust no longer continues upon the land, since, if money be wanting, an executor must sell. To entertain a doubt to the contrary would make it impossible for an executor to raise assets, as no person would venture to buy. The court' (continued His Honor) 'chooses rather to abide by its general rules, than to let in nice distinctions in order to relieve particular persons, though even in the case of creditors themselves.

[“It may probably be considered, for the reasons before stated, and in reference to the last observation respecting the propriety of adhering to general rules, that it is of no consequence with reference to the power of executors to dispose of the assets, whether they be bequeathed upon *trust* or not (*k*).

[“The principle upon which an executor is allowed at law and in equity so extensive a power over property, which he derives from the testator, is the necessity of enabling him to execute his office and trust, and of preventing the inconvenience of implicating third persons in inquiries as to the application of the money produced by conversion of the estate. But that principle will not protect transactions between the executor and a stranger, where the latter is involved with the executor in the commission of a breach of trust, or in a *devastavit* (*l*).”—ED.]

Lands devised
to divers to
be sold for
Payment of
Debts, one of
them may
sell (*m*).

By the statute of the 21 Hen. 8, c. 4, “Whereas divers persons, having other persons seised to their uses of and in lands and other hereditaments to and for the declaration of their wills, have by their last wills and testaments willed and declared such their lands, tenements or other hereditaments to be sold by their executors, as well for the payment of their debts, performance of their legacies, necessary and convenient finding of their wives, virtuous bringing up and advancement of their children to marriage, and also for other charitable deeds to be done by their executors for the health of their souls; and notwithstanding such trust and confidence so by them put in their said executors, it hath oftentimes been seen,

(*k*) [*Scott v. Tyler*, 2 Dick, 712; Legacies, vol. i. p. 380—384.]
S. C. 2 Bro. C. C. 431.]

(*m*) [*Vide supra*, “Form and Man-
ner.”]

(*l*) [White's Edition of Roper on

where such last wills and testaments of such lands and other hereditaments have been declared, and in the same divers executors named and made, that after the decease of such testators, some of the said executors, willing to accomplish the trust and confidence that they were put in by the said testator, have accepted and taken upon them the charge of the said testament, and have been ready to fulfil and perform all things contained in the same, and the residue of the same executors, uncharitably, contrary to the trust that they were put in, have refused to intermeddle in any wise with the execution of the said will and testament, or with the sale of such lands so willed to be sold by the testator: and forasmuch as a bargain and sale of such lands, tenements or other hereditaments so willed by any person to be sold by his executors after his decease, according to the opinion of divers persons, can in no wise be good or effectual in the law, unless the same bargain and sale be made by the whole number of the executors named for the same; by reason whereof, as well the debts of such testators have rested unpaid, to the great danger and peril of the souls of such testators, and to the great hindrance and many times to the utter undoing of their creditors; as also the legacies and bequests made by the testator to his wife and children, and for other charitable deeds to be done for the wealth of the soul of the same testator that made the same testament, have been also unperformed, as well to the extreme misery of the wife and children of said testator, as also to the let of performance of other charitable deeds for the wealth of the soul of the said testator, to the displeasure of Almighty God: for remedy whereof, it is enacted, that where part of the executors named in any such testament of any such person so making or declaring any such will of any lands, tenements or other hereditaments to be sold by his executors, after the death of any such testator, do refuse to take upon him or them the administration and charge of the same testament and last will wherein they be so named to be executors, and the residue of the same executors do accept and take upon them the care and charge of the same testament and last will; that then all bargains and sales of such lands, tenements and other hereditaments so willed to be sold by the executors of any such testator by such of the executors as shall accept and take upon him or them such care or charge of administration of the same testament, shall be as good and effectual in the law as if all the residue of the same executors named in the said testament, so refusing the administration of the same testament, had joined with him or them in the making of such bargain or sale (n)."

A man deviseth *his lands to be sold* after his death by his executor. One tenders to him a certain sum of money for the lands, but not to the value; and the executor afterwards held

In what Case the Heir may enter for the Condition broken.

(n) [See Sugden on Powers, vol. i. c. 3, s. 1, § 25, 26, 30, p. 128—Ed.]

the land in his own hand two years, to the intent to sell the same dearer to some other, and took the profits all this while to his own use. Here the executor is to make the sale as soon as he can, and if he do not, the heir of the devisor may enter; for he took the profits here to his own use, not as assets. But if a man devise that his *executor shall sell* his land, there he may sell at any time, for that he hath but a bare power and no profit (*o*).

A person seised in fee deviseth the land to his executors to pay his debts, and dies, if his executors pay not every debt which the testator owed upon demand, the heir of the testator may enter for the condition broken, because in law it is a devise upon condition (*p*).

But the Chancery may relieve, upon the payment of such debt afterwards.

Fraudulent
alienations to
defeat Cre-
ditors.

By a constitution of Archbishop Stratford (*q*), "All who shall give away or alienate their goods upon their death-beds, to defeat their creditors, to their wives and children; and all who shall counsel the same, or assist therein, or receive the said goods, shall incur the penalty of the greater excommunication, and the giver shall not have christian burial. And no other proof shall be required, that the gift or alienation was malicious or fraudulent, but that enough doth not remain for the purposes abovesaid."

And by the statute of 13 Eliz. c. 5, "For the avoiding of fraudulent deeds, or other conveyances of lands or goods to defraud creditors and others, it is enacted, that every such deed or conveyance shall, (as against such creditors), be void and of none effect."

In the case of *Taylor v. Jones*, June 13, 1743 (*r*), a husband who had 1733*l.* stock devised to him after marriage, vests it in trustees, for the benefit of himself for life, of his wife for life, and afterwards for the benefit of his children. By Fortescue, Master of the Rolls: It is a fraudulent settlement as to creditors; but with respect to the wife and children, it is good as against the father, and even against a voluntary conveyance, but is void as to creditors.

[It should seem that to render a conveyance fraudulent within this statute, the party at the time of making it must be insolvent (*s*).—ED.]

Fraudulent
Administra-
tions to defeat
Creditors.

By the statute of the 43 Eliz. c. 8, "Forasmuch as it is often put in ure to the defrauding of creditors, that such persons as are to have the administration of the goods of others dying

(*o*) Litt. s. 383.

(*p*) 1 Rolle's Abr. 439.

(*q*) Lind. 161.

(*r*) 2 Atk. 600; [2 Roper on Husband and Wife, 165, 6th edit.]

(*s*) [*Cadogan v. Kennett*, Cowp. 434, (by Lord Mansfield); *Walker v. Burrows*, 1 Atk. 93; *Lush v. Wilkinson*, 5 Ves. 384, (Lord Alvanley); but see *Shears v. Rogers*, 3 B. & Ad. 362.]

intestate committed unto them, if they require it, will not accept the same, but suffer or procure the administration to be granted to some stranger of mean estate, and not of kin to the intestate, from whom themselves, or others by their means, do take deed of gifts, and authorities by letters of attorney, whereby they obtain the estate of the intestate into their hands, and yet stand not subject to any debts owing by the intestate; it is enacted, that every person who shall obtain any goods or debts of any person dying intestate, upon any fraud as is aforesaid, or without such consideration as shall amount to the value of the same goods or debts, or near thereabouts, (except it be in satisfaction of some just and principal debt of the value of the same goods or debts to him owing by the intestate at the time of his decease), shall be charged so far as those goods and debts will satisfy as executor of his own wrong (*t*)."

Assets are of two sorts, the one assets *by descent*, the other assets *in hand*. Assets *by descent* is, where a man is bound in an obligation, and dies seised of lands in fee simple, which descend to his heir, then his land shall be called assets, (*assez, satis*), that is, enough or sufficient to pay the same debt; and by that means the heir shall be charged as far as the land so to him descended will stretch. Assets *in hand* is, when a man in like manner indebted makes executors, and leaves them sufficient to pay, or some commodity or profit is come unto them in right of their testator; this is called assets in their hands (*u*).

There is also another [and a very important] division of assets, into *legal* and *equitable* assets. *Legal* assets are such as are liable to debts and legacies by the course of the law; *equitable* assets are such as are only liable by the help of a court of equity (*x*).

So also there are *real* and *personal* assets. *Real* assets are such as concern the land; *personal* are such as concern the personal estate only.

If a man deviseth *land to be sold*, neither the money thereof coming, nor the profits of the land for any time to be taken, shall be accounted as any of the goods and chattels of such person deceased (*y*).

But if a man deviseth land to be sold by one for payment of his debts and legacies, and maketh the same person his *executor*, and dies, the money paid by such person upon the sale of the land, shall be assets in his hands (*z*).

But otherwise it is, where the land is devised to be sold *by the executor and others*; for there the money shall not be

(*t*) See a full exposition of this statute in Wentw. Off. Ex. 181; [see also Godolph. pt. ii. c. 8, s. 2; Swin. pt. iv. s. 23; *Kitchen v. Dixon*, Goldsb. 116, pl. 12.]

(*u*) Terms of the Law.

(*x*) [*Vide infra*, p. 356.]

(*y*) 21 Hen. 8, c. 5, s. 5.

(*z*) 1 Rolle's Abr. 920.

Assets.

1. By Descent,

2. In Hand.

1. Legal,

2. Equitable.

1. Real.

2. Personal.

Lands devised to be sold are equitable Assets.

Assets.

assets; for they are not trusted with it as executors (a). That is, it shall not be assets at law, but it shall be assets in equity (b).

The Court of Chancery leans to construe assets *equitable* rather than *legal*; because in the former case the debts are paid *pari passu*, being equal in conscience, whereas in the latter, they are paid in a course of administration. Therefore, where an executor is also trustee for the payment of debts, the assets are *equitable*, whether lands are devised to him to sell, or he have only a power to sell (c).

So land *articled* by the testator in his lifetime to be sold, is as money (d).

Mortgage for Years goes to the Executor.

If there is a *mortgage for years* (though never so many), this is assets at law; because the whole interest is not gone from the mortgagor, the reversion in fee being left in him. But if it is a *mortgage in fee*, it is only assets in equity, because the legal estate is gone out of the obligor (e).

Mortgage in Fee to the Heir.

If there is a mortgage in fee, and two descents cast, and there is more due on it than the value of the land, and though the mortgagor says he will not redeem, yet it shall go to the executor, and not to the heir, the equity of redemption not being foreclosed or released (f).

But if a mortgagee in fee enters for a forfeiture, and after some years' enjoyment absolutely sells the land to J. S. and his heirs, this estate shall not be looked upon as a mortgage in the hands of J. S., but shall go to his heir, and not to his executor (g).

Mortgages.

A man having several mortgages, one in fee, on which he entered for a forfeiture, devised those lands which were mortgaged in fee to his two daughters and their heirs, and the mortgages to them, their executors and administrators. One of the daughters died: her share of the lands, which were mortgaged in fee, shall go to her heir, and not to her executors; for it was the testator's intent that those lands should pass as a real estate, though between him and a mortgagor they were but a mortgage (h).

If the heir of the mortgagee forecloses the mortgagor, yet the land shall go to the executor, unless the heir thinks fit to pay him the mortgage money; and then he may have the benefit of the mortgage (i).

(a) 1 Rolle's Abr. 920.

(b) 1 Abr. Cas. Eq. 141.

(c) *Lewin v. Okely*, 2 Atk. 50; *Hargrave v. Tindal*, 1 Bro. 136, n.; *Silk v. Prime*, 1 Bro. C. C. 138, n.; [*Newton v. Bennet*, *ibid.* 135; *Batson v. Lindegren*, 2 Bro. 94; *Clay v. Willis*, 1 B. & C. 364; *Barker v. Moy*, 9 B. & C. 489; S. C. 4 Man. & Ry. 336; *vide infra*.]

(d) *Anon.* 1 Salk. 154.(e) *Plunket v. Penson*, Apr. 3,

1742.

(f) *Taber v. Grover*, M., 1699, 2 Vern. 367.(g) *Cotton v. Isles*, M., 1684, 1 Vern. 271; [Coote on Mortgages, 618, 2d edit.](h) *Noys v. Mordaunt*, H., 1706, 2 Vern. 581; [S. C. Gilb. Eq. Rep. 2.](i) *Clerkson v. Bowyer*, 2 Vern. 67.

If the lands are devised to one for life, remainder to another in fee, and the lands are charged with the payment of a sum of money, either by a former devise, rent-charge, or mortgage, the tenant for life shall contribute and pay a proportionable part of such sum (*k*).

And in the case of *Cornish v. Mew*, H., 27 & 28 Car. 2 (*l*), it was decreed, that the tenant for life should contribute one-third, and he in remainder two-thirds to redeem.

The same day in another cause, where a jointress was of lands mortgaged, it was decreed, that the jointress, paying the mortgage, should hold over till she and her executors were repaid with interest (*m*).

Also where the mortgagee devised the mortgaged lands to A. for life, remainder to B. in fee, and the mortgagor redeemed the land, it was decreed that A. should have one-third and B. two-thirds of the mortgage money (*n*).

Lands in mortgage are devised to A. for life, remainder to B. in fee. A. dies; and a bill being brought against his executors, it was held, that though A. in his lifetime might have been compelled to contribute one-third towards payment of the mortgage, in respect of his estate for life, yet his executor shall be obliged to contribute only in proportion to the time that A., his testator, enjoyed it (*o*).

When upon a mortgage, money is made payable to the heir or executor; there, before the day or at the day of payment, the mortgagor hath election to pay it to which he pleases; but after the day of payment is over, and the mortgage forfeited by law—though equity doth give the mortgagor relief, so as upon the payment of the money he shall have his land, yet equity will not revive the election of the mortgagor to pay it to the heir or executor, but then he shall be forced to pay it to the executor, because it came out of the personal estate of the testator, and thither it shall return. But if in the mortgage neither heir nor executor is mentioned, then after the death of the mortgagee, the law determines it to be paid to the executor (*p*).

[But it is now clearly settled, that *money due upon a mortgage*, in every case, is to be paid to the executor or administrator of the mortgagee, by reason of the rule of equity, that the satisfaction shall accrue to the fund which sustained the loss (*q*).—ED.]

Money due on Mortgage.

If a man is seised of an *advowson* in fee, and the church

Avoidance in a Church.

(*k*) *Hayes v. Hayes*, H., 25 Car. 2, Vern. 404.
1 Ch. Ca. 223.

(*l*) 1 Cha. Ca. 271.

(*m*) *Bertue v. Style*, 1 Cha. Ca. 271.

(*n*) *Brent v. Best*, M., 1682, 1 Vern. 70.

(*o*) *Clyat v. Batteson*, T., 1686, 1

(*p*) 2 Freem. 20.

(*q*) [See V. Williams on Ex. & Ad. vol. i. p. 534, who cites *Thornborough v. Baber*, 1 Cha. Ca. 283; *Winne v. Littleton*, 1 Vern. 3; Coote on Mortgages, 617, 2d edit.]

Assets.

doth become void, the void turn is a chattel: and if the patron dieth before he doth present, the advowson doth not go to his heir, but to his executor (*r*).

If the grant of the next avoidance be to one, his heirs and assigns, yet it is but a chattel, and shall go the executors: for where the thing itself is a chattel, the word *heirs* shall not make it an inheritance (*s*).

[If the testator dies before he presents, the church being void, the power of presenting to it is in the executor; but the sale of it would be simoniacal, and therefore it is no assets (*t*).

[But if a stranger presents, and gets his clerk admitted, and the executor recovers damages in a *quare impedit*, the money so recovered will be assets (*u*).

[If the testator died before the church had become void, and therefore the executor might lawfully have sold it, and did not, it seems, he will be liable for its value as assets (*x*).

[The options of an archbishop are assets to his executors (*y*). —*ED.*]

Advowson in Fee,

M., 4 Geo. 2, *Robinson v. Tonge* (*z*). Decreed, that an advowson in fee is assets in the hands of the heir for payment of debts. And the decree was affirmed in the House of Lords.

And in the case of *Westfaling v. Westfaling*, March 5, 1746 (*a*), Lord Hardwicke decreed, that an advowson in fee in gros is assets by descent to satisfy specialty debts; and as to an advowson appendant to a manor, he said there could be no doubt, because the manor itself being assets, what is appendant must be assets likewise.

Estate *pur autre Vie*.

In the case of *Oldham v. Pickering*, M., 8 Will. 3 (*b*), it was adjudged, that an estate *pur autre vie*, although it be assets (by the statute of frauds and perjuries) (*c*) for the payment of debts, yet it is not distributable, nor subject to the payment of legacies.

But by the statute of the 14 Geo. 2, c. 20: "Whereas doubts have arisen on the said statute of frauds and perjuries, where no devise of estates *pur autre vie* hath been made, to whom the surplus of such estates, after the debts of such deceased owners thereof are paid, shall belong, it is enacted, that such estates *pur autre vie*, in case there be no special occupant thereof, of which no devise shall have been made according to the said act, or so much thereof as shall not have been so devised, shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate."

[But neither the statute of frauds, nor 14 Geo. 2, c. 10,

(*r*) Wats. c. 9.

(*s*) Wats. c. 10.

(*t*) [*Rennell v. Bishop of London*, 7 B. & C. 195; and see titles *Avoidance* and *Benefice*, vol. i.]

(*u*) [*Sale v. Bishop of Lichfield*, Owen, 99; *Smallwood v. Bishop of Lichfield*, 1 Leon. 205.]

(*x*) [Wentw. Off. Ex. 173, 14th edit.]

(*y*) [*Potter v. Chapman*, Ambl. 98; and see title *Bishops*, vol. i.]

(*z*) Stra. 879; 3 P. Will. 399.

(*a*) 3 Atk. 465.

(*b*) [29 Car. 2, c. 3, s. 12.]

(*c*) 2 Salk. 464; Ld. Raym. 96.

made provision for the case where a tenant *pur autre vie*, having made a valid will of his personalty, made no disposition of the estate *pur autre vie*. Whether that estate was to be considered as part of the disposed of or undisposed of personalty, Lord Eldon seems to have thought it would belong neither to the heir nor to the executor, but that the latter would be a trustee in equity to hold the estate for the residuary legatee (*d*).

[As to *such* estates of any person who shall not have died before 1st January, 1838, see above, the provisions of the New Will Act, 1 Vict. c. 26, ss. 3, 6, p. 263, 265. A grant for years of an office is assets (*e*).—ED.]

If an executor has a *lease* for years of land, of the value of 20*l.* a year, rendering rent of 10*l.* a year, it is assets in his hands only for 10*l.* over and above the rent (*f*).

Lease for Years.

If an executor renew, he shall account for the new lease as well as the old, for the benefit of the creditors (*g*).

Assets in Ireland are assets in England: and so it hath been resolved, that if the executor had goods of the testator in any part of the world, he shall be charged in respect of them (*h*).

Assets abroad.

So an estate in the *plantations* is testamentary, and assets to pay debts (*i*).

[It is now settled law, that if the deceased was domiciled in this country, all his personal property, wherever it be, is English personalty (*k*).

[But as to British plantations in America, it is now enacted (since the case cited from Ventris in note (*i*)) by st. 5 Geo. 2, c. 7, s. 4, "that the houses, lands, negroes (*l*), and other hereditaments and real estates, situate or being within any of the said plantations belonging to any person indebted, shall be liable to and chargeable with all just debts, duties and demands of what nature or kind soever, owing by any such person to his majesty, or any of his subjects, and shall and may be assets for the satisfaction thereof, in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, proceedings and process in any court of law or equity, in any of the said plantations respectively, for seizing, extending, selling or disposing of any such houses, lands, negroes, and other hereditaments and real estates, towards the satisfaction of such

Lands, Houses, Negroes, &c. in the Plantations liable to satisfy Debts.

(*d*) [Ripley v. Waterworth, 7 Ves. 425.]

(*e*) [Schellinger v. Blockerby, 1 Ves. sen. 347; Sir G. Reynel's case, 9 Co. 97 a.]

(*f*) Body v. Hargrave, Cro. El. 710.

(*g*) 2 Cha. Ca. 208. [See V. Williams on Ex. and Ad. vol. i. p. 523.]

(*h*) Cro. Jac. 55; 6 Co. 46, Dowling's case; [Att.-Gen. v. Diamond,

Lord Lyndhurst, 1 Crompt. & J. 370; S. C. 1 Tyrrwh. 258; Bligh v.

Lord Darnley, 2 P. Wms. 622, as to Ireland; see also, Touchstone, 496.]

(*i*) Noell v. Robinson, 2 Vent. 358; [Blanchard v. Galdy, 4 Mod. 226.]

(*k*) [In re Ewin, 1 Cr. & Jerv. 157; S. C. 1 Tyrrwh. 107; Gardiner v. Fell, 1 Jac. & W. 24.]

(*l*) [Repealed by 37 Geo. 3, c. 119.]

Assets.	debts, duties and demands, and in like manner as personal estates in any of the said plantations respectively are seized, extended, sold or disposed of, for the satisfaction of debts (m)."
India.	[And with respect to realty belonging to British subjects in India, it is enacted by 9 Geo. 4, c. 33,
9 Geo. 4, c. 33.	[Sect. 1. "That whenever any British subject shall die seised of or entitled to any real estate in houses, lands, or hereditaments, situate within or being under the general civil jurisdiction of his majesty's supreme courts of judicature at Fort William in Bengal, Fort Saint George, and Bombay respectively, or whenever any person (not being a Mahomedan or Gentoo) shall die seised of or entitled to any such real estate, situate within the local limits of the civil jurisdiction of the same courts respectively, such real estate of such British subject or other person as aforesaid (not being a Mahomedan or Gentoo) is and shall be deemed assets, in the hands of his or her executor or administrator, for the payment of his or her debts, whether by specialty or simple contract, in the ordinary course of administration.
Whenever any British Subjects, or Persons not being Mahomedans or Gentoos, shall die, entitled to any Real Estate in India, such Estate shall be deemed Assets.	
Executors may sell such Real Estates for the Payment of Debts.	[Sect. 2. "That it is and shall be lawful for such executor or administrator of such British subject or other person as aforesaid (not being a Mahomedan or Gentoo), to sell and dispose of such real estate for the payment of such debts as aforesaid, and to convey and assure the same estate to a purchaser, in as full and effectual a manner in law as the testator or intestate of such executor or administrator could or might have done in his lifetime.
In any Action for Debt, the Executor may be charged with the full Amount of such Real Estate.	[Sect. 3. "That in any suit or action to be commenced and prosecuted in any of the said courts respectively, against such executor or administrator as aforesaid, for the recovery of any debt or demand due and owing by such testator or intestate in his lifetime and at the time of his death, such executor or administrator shall and may be charged with the full amount in value of such real estate as aforesaid, not exceeding the actual net proceeds of such estate when sold by the sheriff, as assets in the hands of such executor or administrator to be administered.
In Suits against Executors, Courts may order Writs of Sequestration.	[Sect. 4. "That in any such suit or action against such executor or administrator as aforesaid, it is and shall be lawful for the said courts respectively to award and issue such writs of sequestration and execution against such houses, lands, and real effects of such testator or intestate, in the hands of such executor or administrator as aforesaid, and to cause the same to be seized, sequestered, and sold, or possession thereof delivered under such writs respectively, in the same manner as such courts could and might have done in the lifetime of such testator or intestate as aforesaid (n)."—ED.]
Bonds and Specialties.	<i>Bonds and specialties</i> are no assets, until the money is paid (o).
Damages.	A <i>power</i> unless executed is not assets for debts (p). If an executor recovers damages in trespass for <i>goods taken</i>

(m) [Thomson v. Grant, 1 Russ. Ch. Cas. 540, note to Player v. Foxhall; Manning v. Spooner, 3 Ves. 118.]

(n) [Sandilands v. Innes, (V. C. Shadwell), 3 Sim. 63.]

(o) Nock v. Nelson, 1 Vent. 96.

(p) Holmes v. Coghill, 7 Ves. 499.

away in the life of the testator, this (when recovered) shall be assets, because he recovers it as executor (q).

If an executor recovers (as executor) things in *Chancery* by equity, these things so recovered shall be assets (r).

A debt due from an executor to a testator is assets in equity Debts. to pay legacies (s).

The interest which a master hath in a *servant* is not assets Interest in a Servant; in the hands of an executor; for a servant whose master is dead is legally discharged, and is not servant either to the heir or executor; but meet and honest it is that one of them continue him in service till a fit time of providing for him a new master, and fit for him, not to depart suddenly (t).

But the interest which one hath in an *apprentice* is a chattel in an App- personal, and shall go to the executors (u). prentice.

T., 17 Car. 2, *Walker v. Hall* (x). An action was brought against the executor, upon the covenant of the testator to teach an apprentice his trade; and after verdict for the plaintiff, it was moved in arrest of judgment, that this covenant was personal to the testator, and did not oblige the executors, but only obliged the master during his life to teach the apprentice. But by the court: "It obliged the executors also, and they ought to see the apprentice taught his trade; and if they be not of the trade, they ought to assign him to another that is of the trade, so that he may be taught according to the covenant." And judgment was given for the plaintiff.

The interest in the liberty of a *prisoner* in execution for debt Liberty of a Prisoner. is a chattel personal, and shall go to the executors (y).

If an executor puts in suit a bond of 100*l.* for performance of covenants, and the parties submit to an *award*, and it is awarded that the obligor shall pay 70*l.* in full satisfaction, and that the executor shall release, which is done accordingly, it is said that the executor shall be taken to have assets to the value of the whole 100*l.*; and though by the award he was compelled to release, it was his own act to submit to the arbitrament (z).

If an arbitrator, under a reference between A. and B. administrator award that B. shall pay a certain sum as the amount of A.'s demand, B. cannot afterwards object that he had no assets, but he may be attached for non-performance (a).

A *reversion* expectant upon an estate for life, is assets in the

(q) 1 Roll. Abr. 920.

(r) Ibid.

(s) 3 Cha. Ca. 89.

(t) Went. 55.

(u) Law of Test. 378, 379; Went. 55; 2 Bac. Abr. 416, 443.

(x) 1 Lev. 177. [Query. Is this *Walker v. Hall*, 1 Lev. 177, which is said in *Baxter v. Burfield*, 2 Stra.

1266, to have been denied by the court? See V. Williams on Ex. & Ad. vol. ii. 645.—Ed.]

(y) Law of Test. 378; 2 Bac. Abr. 416.

(z) 3 Leon. 53.

(a) *Worthington v. Barlow*, 7 T. Rep. 453.

hands of the heir: but the creditor cannot compel the heir to sell it, but must wait till it falls (b).

In what Case
the Lands and
the Person-
alty shall be
charged in
Aid of each
other.

If there be a debt due to the king, equity will order it to be paid out of the real estate, that the other creditors may have satisfaction for their debts out of the personal estate (c).

A mortgage is a charge upon the personal estate, as well as upon the lands mortgaged; and the personal estate is primarily liable: for a mortgage is a general debt, and the land is only as security (d).

Mortgage.

If one dies indebted by mortgage and simple contract, and one of the simple contract creditors gets judgment of assets when they shall happen, and the executor applieth the assets to pay off the mortgage, the simple contract creditors shall stand in the place of the mortgagee as to what he hath exhausted out of the personal assets: and this *being only by aid of equity, all the simple contract creditors shall come in equally with the creditor that hath judgment* (e).

Case of
Haslewood
v.
Pope.
Where a Man
devises his
Lands for the
Payment of
all Debts,
Specialty and
Simple Con-
tract, and
Bond Credit-
ors, having
been partly
paid from the
Personalty,
apply for the
Rest from the
Realty.

So in the case of *Haslewood v. Pope*, T., 1734 (f), it was decreed that if a man deviseth his lands to trustees to pay all his debts, and dies indebted by specialty and simple contract, and the bond creditors recover part of their debts out of the personal estate, and afterwards they apply to be paid the rest of their bond debts out of the real estate devised for that purpose; *in this case, as the testator intended all his creditors should be equally paid their debts, the bond creditors shall not come in upon the land until the simple contract creditors have received so much thereout as to make them equal, and upon the level with the bond creditors, in respect of what they received out of the personal estate.* It was also decreed, that *where one gives a specific, or even a pecuniary legacy, and deviseth lands to pay his debts, if a simple contract creditor comes upon the personal estate, and exhausts it so far as to break in upon the specific or pecuniary legacy, these legatees shall stand in the place of the creditors, to receive their satisfaction out of the fund raised by the testator for the payment of their debts.* But where a man dies indebted by bond, and leaves a personal estate, and deviseth lands to one in fee, and gives specific legacies, and the creditor by bond comes on the personal estate to be paid his bond, the specific legatees shall not stand in the place of the bond creditor, to charge the land devised, because the devisee of the land is as much a specific devisee as the legatee of a specific legacy. And in this cause the Lord Chancellor said, that *the personal estate is the natural fund for payment of debts, and which as against creditors, unless they please, the testator cannot exempt; but against the devisee of his land he*

(b) 1 Abr. Eq. Cas. 275.

(c) 1 Vent. 455.

(d) *Bartholomew v. Moy*, 1 Atk.

487.

(e) *Wilson v. Fielding*, M., 1718,

2 Vern. 763; [*vide supra*, 365.]

(f) 3 P. Wms. 322.

may, by appropriating his land as a fund for payment of his debts; but even in that case, according to the general rule, there ought to be express words to exempt the personal estate from the debts, or at least very plainly showing this to have been the intention of the testator.

It was formerly held that there must be express Words to exempt Personalty from Payment of Debts.

So where a man deviseth all his freehold houses, lands, and hereditaments to trustees, to hold to them in trust, that the freehold estate should be subject to, and be sold and disposed of by them for payment of his just debts, and after disposing of some particular legacies, he gave to his nephew the rest and residue of his goods, chattels, debts, rights, credits, and personal estate not before disposed of. Hereupon the question was, whether the personal estate should be first applied to the payment of the debts, notwithstanding the real estate was expressly devised for that purpose. The counsel for the defendants (who were the trustees and residuary legatee) insisted, that the real estate being not only made subject, but directed to be sold for payment of the debts, the personal estate should not be applied for that purpose. But by the whole Court of Exchequer: "*Here being no negative words to exclude the personal estate from being applied for the payment of debts, that ought first to be applied for the benefit of the heir at law (who was the plaintiff);*" and decreed accordingly (g).

And by the Lord Chancellor Hardwicke, in the case of *Walker v. Jackson*, July 22, 1743 (h), upon a rehearing at Lincoln's-Inn Hall: "The general rule is, that the personal estate shall be first charged with payment of debts and legacies; and the testator cannot exempt it from being liable to his debts, as against creditors, but as between heir and executor he may charge them upon any other fund which is not primarily liable, and discharge the personal estate. There are several ways by any of which a man may give his real estate for payment of his debts; as, first, to trustees; secondly, by way of charge in equity, which the Court of Chancery will decree to be performed; or, thirdly, he may direct that his real estate may be sold for the payment of his debts: but let him do which way he pleases, none of these ways will make the real estate first chargeable, if there be not in the will either express words or a manifest intent to discharge the personal estate, but it shall be first liable."

Walker
v.
Jackson.

And in the case of *Bridgman v. Dove*, Nov. 27, 1744 (i), By the Lord Chancellor Hardwicke: "I know of no authority where the words 'I make my real estate liable to pay my debts' will exempt the personal estate without any special exemption of personal estate. Nor has the court ever said that personal estate shall be applied only to pay legacies, and

Bridgman
v.
Dove.

(g) *Fereyes v. Robertson*, Bunb. 302.

(i) 3 Atk. 202.

(h) *Ibid.*; 1 Wilson, 24.

Bridgman
v.
Dove.

not the debts. Nor will making a particular estate in land liable to pay debts exonerate the personal estate, because it is the natural fund for payment of debts. Suppose a man deviseth a real estate liable to the payment of debts, and subject to those debts gives it over to another, or what remains after the payment of debts, which is all one; if there are not express words to exempt the personal estate, it shall be first applied in exoneration of the real estate.

[But the strict rule as to the necessity of express words of exemption has been since relaxed it is said.—ED.]

Per Lord Thurlow, C.: Two rules have been established on this subject; 1st, that the personal estate is liable, in the first instance, to the payment of debts; 2nd, that a declaration plain shall stand in lieu of express words to discharge it, if such appear to be the testator's intention (*k*). And it frequently happens that a variation of charge from the real to the personal estate, or the reverse, may be gathered from the parts of the will (*l*). Under the following devise, "As to all my worldly estate, I desire all my just debts should be first paid," it was decreed that on failure of the personal estate, copyhold lands were liable as well as freehold (*m*). Under a devise to sell and pay debts and funeral expenses, the personal estate was held to be exempt without express words upon the evident intention (*n*). But to exempt the personal estate under a devise for payment of debts, the intention must plainly appear on the will, and the court cannot look to *extrinsic* circumstances (*o*). Where the testator directed "that all his legal debts, legacies, and funeral expenses, should be fully paid," it was held not sufficient alone to charge legacies on real estates specifically devised, for the intent must be clear to induce the court to marshal assets in favour of legatees (*p*).

Result of all
the Cases.

[In fact, the result of all the cases is, that the rule of construction is such as aims at finding not that the real estate is charged, but that the personal is discharged: there must be shown the intention to discharge the latter, not to charge the former (*q*).—ED.]

In what case
both Executors
shall be
charged,
where one
only hath
Assets.

In an action of debt against two executors, if they plead severally by several attornies fully administered, and the jury find that the one hath assets, and that the other hath not any assets, the judgment shall be only against him who is found to

(*k*) *Duke of Ancaster v. Mayer*,
1 Bro. 454; *Watson v. Brickwood*,
9 Ves. 447.

(*l*) *Hone v. Medcraft*, 1 Bro. 260,
with the cases cited.

(*m*) *Coombes v. Gibson*, 1 Bro.
273.

(*n*) *Burton v. Knowlton*, 3 Ves.
107.

(*o*) *Brummet v. Prothero*, 3 Ves.
111.

(*p*) *Kightley v. Kightley*, 2 Ves.
jun. 328; *Keeling v. Brown*, 5 Ves.
359.

(*q*) [*Bickham v. Cruthwell*, 3 M.
& C. 763. See also Mr. Vaughan
Williams's chapter on Real Assets,
&c. vol. ii. p. 325.—ED.]

have assets, and that the other who had not assets shall go quit (r).

But where two executors join in an acquittance, but one only receives the money, both are chargeable for it as to creditors, who are to have the utmost benefit of the law; but the actual receiver, it is said, is only chargeable as to legatees or persons claiming under distribution; for the substantial part is the actual receiving of the money, and this only is regarded in conscience. By Harcourt, Lord Chancellor, M., 12 Ann. (s)

In *Leigh v. Barry* (t), Lord Hardwicke takes a difference between *trustees* and *executors*, viz. that the former, though they all join in receipts, shall only be liable for what they receive individually, because they are obliged to join for conformity, but otherwise as to executors who may act severally if they think fit. Where by a voluntary joint act of executors the testator's money gets into the hands of one of them, or a stranger, they shall all be liable (u). But that a party's signing a *receipt* is not in all cases *conclusive* evidence against him of the receipt of money, even at law, appears by the above-mentioned cases, and *Straton v. Rastal* (x).

Where an executor has once received money, assets of his testator, he cannot discharge himself under the plea of *plene administravit* to an action by a bond creditor of his testator, by showing that he paid the money to his co-executor, even for the purpose of satisfying the bond creditor, who had applied for payment to such co-executor; if the co-executor afterwards misapply the money by retaining it to satisfy his own simple contract debt (y).

It has been held, however, that in equity an executor does not make himself answerable for the receipts of his co-executor merely by taking probate, permitting him to possess the assets, and joining in acts necessary to enable him to administer; but if he goes further, and concurs in the application, he is answerable (z).

[The result of the principal authorities upon the important subject when an executor or administrator becomes guilty of a *devastavit* or wasting of the assets, in investing them in insecure funds, is stated by Lord Cottenham in a recent case (a): "Although a personal representative, acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation

When an Executor or Administrator is guilty of a *devastavit*.

(r) 1 Rolle's Abr. 929.

Vin. Abr. 534.

(s) *Churchill v. Hobson*, 1 Salk. 318; S. C. by Ld. Northington, C., *Westley v. Clarke*, reported in Mr. Cox's note to 1 P. Wms. 83.

(x) 2 T. Rep. 366.

(y) *Cross v. Smith*, 7 East's Rep. 246.

(t) 3 Atk.

(z) *Hovey v. Blakeman*, 4 Ves. 596, [Ld. Alvanley; *Jay v. Campbell*, 1 Scho. & Lefr. 341, Ld. Redesdale.]

(u) *Sadler v. Hobbs*, 2 Bro. N. C. 114; *Scurfield v. Howes*, 3 Bro. 90; *Murrel v. Cox and Pitt*, 21

(a) [*Clough v. Bond*, 3 M. & C. 496.]

When an Ex-
ecutor or Ad-
ministrator
is guilty of a
devastavit.

of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it; yet, if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds or upon securities not authorized, or be put within the control of persons who ought not to be intrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive. Thus, if he omit to sell property when it ought to be sold, and it be afterwards lost without any fault of his, he is liable (*b*); or if he leave money due upon personal security, which, though good at the time, afterwards fails (*c*). And the case is stronger if he be himself the author of the improper investment, as upon personal security, or an unauthorized fund. Thus he is not liable upon a proper investment in the 3 per cents. for loss occasioned by the fluctuations of that fund (*d*); but he is for the fluctuations of any unauthorized fund (*e*); so, when the loss arises from the dishonesty or failure of any one to whom the possession of part of the estate has been entrusted. Necessity, which includes the regular course of business in administering the property, will, in equity, exonerate the personal representative. But if, without such necessity, he be instrumental in giving to the person failing possession of any part of the property, he will be liable, although the person possessing it be a co-executor or co-administrator (*f*).”—ED.]

Funeral Ex-
penses.

[First (*g*),] the funeral expenses shall be paid.

But in *Shelly's case*, T., 5 Will. 3 (*h*), it is said that in strictness no funeral expenses are allowed against a creditor, except for the coffin, ringing the bell, parson, clerk, and bearers' fees, but not for pall or ornaments. Perhaps the expenses of the shroud and digging the grave ought also to have been added.

In general it is said that no more than 40s. for funeral expenses shall be allowed against creditors (*i*).

By Lord Hardwicke, C., in *Stag v. Punter* (*k*): “At law,

(*b*) [*Phillips v. Phillips*, Freem. Cha. Ca. 11.]

(*c*) [*Powell v. Evans*, 5 Ves. 839; *Tebbs v. Carpenter*, 1 Madd. 290.]

(*d*) [*Peat v. Crane*, 2 Dick. 499, note.]

(*e*) [*Hancom v. Allen*, 2 Dick. 498; *Howe v. Earl of Dartmouth*, 7 Ves. 137; see p. 150.]

(*f*) [*Longford v. Gascoyne*, 11 Ves. 333; *Lord Shipbrook v. Lord Hinchinbrook*, 11 Ves. 252; 16 Ves. 477; *Underwood v. Stevens*, 1 Mer. 712; and see *Hanbury v. Kirkland*,

3 Sim. 265. See V. Williams's chapter on *Devastavit*, vol. ii. p. 1411, as to the liability of executors and administrators for tortious and negligent acts.—ED.]

(*g*) [The word in Dr. Burn is “next,” i. e. after the paying of the forfeiture for not burying in woollen, due by 30 Car. 2, c. 3, repealed by 54 Geo. 3, c. 108.—ED.]

(*h*) 1 Salk. 196.

(*i*) 3 Atk. 249.

(*k*) 1 Atk. 119.

where a person dies insolvent, the rule is, that no more shall be allowed for a funeral than is necessary, at first only 40s., then 5*l.*, and at last 10*l.*" But the executor here having had reasonable ground to believe the estate solvent, from the large legacies left by the testator, and it not being clear that upon the whole there would be a deficiency, his lordship allowed 60*l.* for the funeral expenses, the testator having directed that he should be buried thirty miles from the place of his death. [But recent cases have fully established that the executor is entitled to be allowed reasonable expenses according to the testator's condition in life, and that no precise sum can be fixed (*l*).—ED.]

By the statute of the 17 Geo. 2, c. 38, s. 3, "If any overseer of the poor shall die, his executors or administrators shall within forty days after his decease, pay out of the assets all money remaining due, which he received by virtue of his office, before any of his other debts are paid."

Overseers of the Poor dying.

[The 33 Geo. 3, c. 54, relating to money in the hands of officers of a friendly society, was repealed by 10 Geo. 4, c. 56, but the 20th section of this act contained a similar provision to the 10th section of the repealed act. This provision of 10 Geo. 4, was again repealed by 4 & 5 Will. 4, c. 40, s. 1, but it enacted by section 12,

["That if any person already appointed or who may hereafter be appointed to any office in a society established under the said recited act (*m*) or this act, and being entrusted with the keeping of the accounts, or having in his hands or possession, by virtue of his said office or employment, any monies or effects belonging to such society, or any deeds or securities relating to the same, shall die, or become a bankrupt or insolvent, or have any execution or attachment or other process issued, or action or diligence raised, against his lands, goods, chattels, or effects, or property or estate, heritable or moveable, or make any assignment, disposition, assignation, or other conveyance thereof for the benefit of his creditors, his heirs, executors, administrators, or assignees, or other persons having legal right, or the sheriff or other officer executing such process, or the party using such action or diligence, shall, within forty days after demand made in writing by the order of any such society or committee thereof, or the major part of them assembled at any meeting thereof, deliver and pay over all monies and other things belonging to such society to such person as such society or committee shall appoint, and shall pay, out of the estates, assets, or effects, heritable or moveable, of such person, all sums of money remaining due which such person received by virtue of his said office or employment, before any other of his debts are paid or

4 & 5 Will. 4, c. 40.

Executors, &c. of Officers of Friendly Society to pay Money due to Society before any other Debts.

(*l*) [See *Hancock v. Podmore*, 1 B. & Ad. 260; *Edwards v. Edwards*, 2 Cr. & M. 612; *Reeves v. Wood*, 2 Scott, 395; *Bisset v. Antrobus*, 4 Sim. 512; *Stackpoole v. Stackpoole*, 4 Dow. 227; *Paice v. Archbishop of Canterbury*, 14 Ves. 364; *Mullick v. Mullick*, 1 Knapp, 245, an appeal from the Supreme Court at Bengal, as to the funeral of a Hindoo testator; and see title *Burial*, vol. i.]

(*m*) [*I. e.* 10 Geo. 4, c. 56.]

satisfied, or before the money directed to be levied by such process as aforesaid, or which may be recovered or recoverable under such diligence, is paid over to the party issuing such process or using such diligence; and all such assets, lands, goods, chattels, property, estates, and effects shall be bound to the payment and discharge thereof accordingly."

[And by section 14 of 4 & 5 Will. 4, c. 20, the provisions of the original statute 33 Geo. 3, c. 54, shall continue in force as to all societies established under it before the passing of 10 Geo. 4, c. 56 (*n*).

Charges of
Probate or
Administra-
tion.

Next to these, as it seemeth, come the charges of the probate of the will or of the letters of administration (*o*).

[It seems that the costs in a suit of equity are to be deemed part of the expenses in administering the estate (*p*). But where the will provides for the payment of "testamentary expenses" out of a specific bequest; such words are held to be limited to the expenses in the court of probate, the expenses in equity therefore will be defrayed out of the residue (*q*).—ED.]

Debts due to
the King on
Record.

Next, debts due by the testator to the king are to be discharged; and it is not in the choice of the executor to prefer any other debt due to any subject (*r*).

Which must be understood of such debts as are due to the king only by matter of record, and not of sums of money due to the king upon wood sales or sales of his minerals, for which no obligation is given; or of amercements in his courts baron or courts of his honours, which be not courts of record; or of fines for copyhold estates there; or of forfeitures to the crown of debts by contract due to any subject by outlawry or attainder, until office thereupon found (*s*). [And these debts, viz. such as are due to the crown by record or specialty, claim precedence of all other debts of whatever nature, as well of a prior as of a subsequent date (*t*).—ED.]

Debts due to
the Post
Office.

By the statute of the 9 Anne, c. 10, s. 30, debts due to the

(*n*) [Mr. Vaughan Williams ranks the debts under these statutes, as well as under the repealed statute of Charles, *after* the debts due to the crown.—Wms. Ex. & Ad. vol. ii. 794 and 798. See *Ex parte Lancaster Society*, 6 Ves. 99. And certainly it would seem that the credit given for duties on probates as under 55 Geo. 3, c. 194, must rank before debts to particular societies. *Vide post*. As to regimental debts, see sections 1 & 2 of 58 Geo. 3, c. 73; as to those due to paving commissioners, 57 Geo. 3, c. 29, s. 51.—ED.]

(*o*) [See title *Jres*, vol. ii.]

(*p*) [*Loemes v. Stotherd*, 1 Sim. & Stu. 561.]

(*q*) [*Browne v. Groombridge*, 1 Madd. 495.]

(*r*) Swin. 455.

(*s*) Swin. a. 455, 456; 2 Bac. Ab. 432.

(*t*) [*Littleton v. Hibbins*, Cro. Eliz. 793. The rules of priority in the payment of debts must be observed by the personal representative of the deceased; but if the assets fail, and he have paid a debt in a lower before one in a higher degree, he becomes responsible for the latter out of his own estate. 2 Bla. Com. 511.—ED.]

post office for letters shall be preferable in payment before any debt due to any private person.

Next, debts due to private persons upon judgments against the deceased in his life; and after those, debts upon judgments (although by mere confession and without defence) against the executor or administrator for the debts of the deceased (*u*). Judgments.

But it is said that the executor is not bound to take notice of judgments against the testator in his life, without being made acquainted therewith by the creditors; for the executor is no way privy to his acts (*x*). What shall be sufficient Notice to bind the Executor.

But in the case of *Littleton v. Hibbins*, M., 42 Eliz. (*y*), it was adjudged that *executors at their peril ought to take notice of debts upon record*.

In the case of *Paterson v. Huddleston*, T., 2 Geo. 2 (*z*), an action of debt upon a bond was brought against the defendant as executor. The defendant pleads a recovery against him already had in a plea of debt, and that he had no notice of this bond at that time, and that there was no more in his hands than would satisfy this recovery. Upon this the plaintiff demurs. The court observed, that it did not appear but that this recovery might be in debt upon bond, or other matter of as high nature, and then undoubtedly the plaintiff ought to be barred. But, however, *if the recovery was upon a simple contract, they were unanimously of opinion, if the defendant had no notice of the bond, that the recovery would be a good bar. They said, in this consists the difference between duties of a private nature and duties upon record; for those executors are bound to take notice of at all events, but these they need not, where a suit is commenced against them to recover debts of an inferior nature.* They said also that there is no occasion that executors should hold out a suit to the last before they make such payments; but if an action is taken out against them, it is the same. But if an executor makes a voluntary payment of a debt by simple contract, where there are not assets to satisfy the bond debts, it is otherwise, though he hath no notice; for there are many cases where a man's voluntary act shall prejudice him, where the necessity of law would not. Upon the whole, judgment was given for the defendant. Distinction between Debts of Record and other Debts.

If the judgment is satisfied (*a*), and is only kept on foot to Judgments.

(*u*) Law of Ex. 39; Treatise of Eq. 112, B. 4, pt. 2, c. 2, s. 2.

(*x*) 1 And. 159.

(*y*) Cro. Eliz. 793.

(*z*) 1 Barnard. 186. [See also *Hickey v. Hayter*, 6 Durn. & East (Term Reports), 388; *Searle v. Lane*, 2 Freem. 104; S. C. 2 Vern. 8, 9; *Herbert's case*, 3 P.Wms. 117; *quære*, however, how far the law on the sub-

ject of notice may be affected by 2 & 3 Vict. c. 11, mentioned below.]

(*a*) [As a general rule it seems clear, with respect to other species of debts, that if an executor be apprised of a debt of a higher degree, he would not be justified in exhausting the assets in payment of one which is inferior. *Oxenham v. Clapp*, 2 B. & Ad. 312.—ED.]

wrong other creditors, or if there be any defeasance of the judgment yet in force, then the judgment will not avail to keep off other creditors from their debts (b).

And of two judgments, he who first sues execution must be preferred; but before, it is at the election of the executor to pay which he will first; only a judgment in a foreign country, as France, is to be considered but as a simple contract (c).

And it is not necessary that the judgment be limited to the courts at Westminster; but if it be obtained in any court of record which hath power to hold plea by charter or prescription of debt above 40s. it is sufficient. For though upon such a judgment execution cannot there be had but of such goods as are within the jurisdiction of that court, yet if the record be removed into Chancery by a *certiorari*, and there by *mittimus* into one of the benches, then execution may be had upon any goods in any county of England (d).

4 & 5 W. & M.
c. 20.

But a judgment not docketed, as by the 4 & 5 W. & M. c. 20, shall not affect any lands as to purchases or mortgagees, or have any preference against heirs, executors, or administrators in the administration of the estates of their ancestors, testators, or intestates.

Which act, in order to render more easy the finding of such judgment entered, directs in what manner alphabetical lists shall be made of judgments by confession, *non sum informatus* or *nihil dicit*, in any of the courts of record at Westminster, to which any person may resort, on paying 4d. and no more.

A debt on judgment not docketed according to the directions of this act, is put by it on a level with simple contract debts. Therefore on a plea of *plene administravit* to debt on a judgment obtained against the intestate, but not docketed, the administrator may give in evidence payment of bond and other specialty debts which exhausted the assets (e). And an outstanding judgment against a testator or intestate, not docketed, cannot be pleaded by an executor or administrator to an action on simple contract (f).

2 & 3 Vict.
c. 11.

No Judgments to be hereafter docketed under the Provisions of 4 & 5 W. & M. c. 20.

[But now by statute 2 & 3 Vict. c. 11 (g) it is enacted,

[Sect. 1. "That no judgment shall hereafter be docketed under the provisions of an act passed in the fourth and fifth years of the reign of their late majesties King William and Queen Mary, intituled 'An Act for the better Discovery of Judgments in the Courts of King's Bench, Common Pleas, and Exchequer, at West-

(b) Swin. a. 456; 2 Bac. Ab. 433.

(c) Treat. of Eq. b. 4, pt. 2, c. 2, s. 2; Swin. a. 436.

(d) Swin. a. 456; [Searle v. Lane, 2 Vern. 89. See as to a judgment in the Lord Mayor's Court, Holt v. Murray, 1 Sim. 485.—Ed.]

(e) Hickey v. Hayter, 6 T. R. 384; [Hall v. Tapper, 3 B. & Ad. 655.]

(f) Steel v. Rorke, 1 B. & P. 307; and Hopwood v. Watts, 5 B. & Ad. 1056; Braithwaite v. Watts, 2 Cr. & Jerv. 318.]

(g) [Which is intituled "An Act for the better Protection of Purchasers against Judgments, Crown Debts, *Lis Pendens*, and Fiats in Bankruptcy."]

minster,' but that all such dockets shall be finally closed immediately after the passing of this act, without prejudice to the operation of any judgment already docketed and entered under the said recited act, except so far as any such judgment may be affected by the provisions hereinafter contained."

[Sect. 2. "That no judgment already docketed and entered under the said recited act of their late majesties King William and Queen Mary shall after the first day of August one thousand eight hundred and forty-one affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless and until such memorandum or minute thereof as is prescribed in an act passed in the first and second years of her present majesty Queen Victoria, intituled 'An Act for abolishing Arrest on Mesne Process and Civil Actions, except in certain Cases; for extending the Remedies of Creditors against the Property of Debtors; and for amending the Laws for the Relief of Insolvent Debtors in England,' shall be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the same in manner thereby directed in regard to judgments; and such officer shall be entitled for any such entry to the sum of five shillings (*h*)."

As to Judgments already docketed.

1 Vict. c. 110.

[Sect. 3 provides that the date when the memorandum of judgment is left shall be entered in a book.

[Sect. 4. "That all judgments of any of the superior courts, decrees or orders in any court of equity, rules of a court of common law, and orders in bankruptcy or lunacy, which since the passing of the said recited act of the first and second years of the reign of her present Majesty have been registered under the provisions therein contained, or which shall hereafter be so registered, shall, after the expiration of five years from the date of the entry thereof, be null and void against lands, tenements, and other hereditaments, as to purchasers, mortgagees, or creditors, unless a like memorandum or minute as was required in the first instance is again left with the senior master of the said Court of Common Pleas within five years before the execution of the conveyance, settlement, mortgage, lease, or other deed or instrument vesting or transferring the legal or equitable right, title, estate, or interest in or to any such

Judgments, after Five Years from Entry, to be void, unless a fresh Memorandum is left.

(*h*) [It had been already enacted by stat. 1 Vict. c. 110, s. 19, "That no judgment of any of the said superior courts, nor any decree or order in any court of equity, nor any rule of a court of common law, nor any order in bankruptcy or lunacy, shall by virtue of this act affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless and until a memorandum or minute, containing the name and the usual or last known place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and the court and the title of the cause or matter in which such judgment, decree, order,

or rule shall have been obtained or made, and the date of such judgment, decree, order, or rule, and the account of the debt, damages, costs, or monies thereby recovered or ordered to be paid, shall be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the same particulars in a book in alphabetical order by the name of the person whose estate is intended to be affected by such judgment, decree, order or rule; and such officer shall be entitled for any such entry to the sum of five shillings; and all persons shall be at liberty to search the same book on payment of the sum of one shilling."—ED.]

purchaser or mortgagee for valuable consideration, or as to creditors, within five years before the right of such creditors accrued, and so, *toties quoties*, at the expiration of every succeeding five years (i); and the senior master shall forthwith re-enter the same in like manner as the same was originally entered; and such officer shall be entitled for any such re-entry to the sum of one shilling." —ED.]

Decree in
Equity.

In the case of *Harding v. Edge*, H., 1682 (k), in the Chancery. Upon a special report the sole question was, how a duty decreed should take place in relation to other debts in point of priority of satisfaction; and ordered that a decree should precede debts on simple contracts and bonds, and take place next to judgments.

But in the case of *Peploe v. Swinburn* (l), M., 1719, in the Exchequer, it was decreed that creditors by judgment at law and creditors by decree in equity shall be paid equally without any preference.

And it is now become the established doctrine that a decree of the Court of Chancery is equal to a judgment in a court of law. So where an executrix, whose testator was greatly indebted to divers persons in debts of different natures, being sued in Chancery by some of them, appeared and answered immediately, admitting their demands, (some of the plaintiffs being her own daughters), and other of the creditors sued the executrix at law, where the decree not being pleadable, they obtained judgments; yet the decree of the Court of Chancery, being for a just debt, and having a real priority in point of time, not by fiction and relation to the first day of the term, was preferred in the order of payment to the judgments, and the executrix protected and indemnified in paying a due obedience to such decree, and all proceedings against her at law stayed by injunction. Case of *Morris v. The Bank of England*, decreed first at the Rolls by Sir Joseph Jekyll, in August, 1735; which was affirmed by the Lord Talbot in November, 1730: and his lordship's decree affirmed in parliament in May, 1737 (m).

In the case of *Turwin v. Gibson* (n), July 31, 1749, where a sum was decreed to the plaintiff, it was ruled by Lord Hardwicke, that the solicitor in the cause, for his trouble and money disbursed for his client, had a right to be paid out of the sum decreed, and that in this case the administrator cannot apply the assets in the course of administration. And this, he said, is the constant rule in Chancery.

(i) [See Mr. Vaughan Williams's remark on this statute, Exors. & Ad. vol. i. p. 804.]

(k) 1 Vern. 143.

(l) Bunb. 48.

(m) 3 P. Wms. 402, [note to Ro-

binson v. Tongue]; Cas. Talb. 217; [Searle v. Lane, 2 Vern. 89; Artley v. Powis, 1 Ves. sen. 496.]

(n) 3 Atk. 720. [As to what sort of decree is entitled to the precedence, *Smith v. Eyles*, 2 Atk. 385.]

Next, debts upon recognizances at common law (o).

And debts upon statutes merchant or staple, or recognizances in nature of a statute staple (p).

Recogni-
zances and
Statutes.

And these recognizances and statutes standing in equal degree, it is at the executor's election to give precedence to which he will (q).

Neither between one statute and another doth the time or antiquity give any advantage as touching the goods, though touching the lands of the conusor it doth. But as for the goods in the hands of the executor, he who first seizeth them by execution is preferred; and before suing of execution, the executor may give precedence to which he will (r).

But amongst statutes and recognizances those which are forfeited shall be preferred before those which are for the performance of covenants not broken (s).

And these, before they are broken, do not take place of specialties (t).

In the case of *The Earl of Bristol v. Hungerford* (u), M., 1705, it was first decreed at the Rolls, that mortgages were to be paid in the first place, and then judgments, and then recognizances; but upon an appeal to the House of Lords, it was adjudged, that mortgages are not to be preferred to other real incumbrances; but that mortgages, statutes and recognizances shall take place according to their priority and as they stand in order of time. Mortgages.

If an estate is devised in trust for payment of debts, a mortgagee who lent a further sum upon bond, shall not be allowed to tack it to his mortgage in preference to creditors (x).

So where a person claims the equity of redemption, as a purchaser for a valuable consideration, without notice of the mortgage, the mortgagee cannot tack his bond to it, and can only have it out of the general assets of the mortgagor (y).

But if a mortgagor, after making a mortgage, borrows money of a mortgagee upon bond, and the mortgaged premises descend upon an heir at law, or come to a volunteer, the court will not suffer them to redeem the mortgage, without paying the bond; and this is to prevent a circuitry, because the moment the estate descended, or came to the volunteer, it became assets, and

(o) Law of Ex. 39; [As to the nature of the recognizances, see *Glynn v. Thorp*, 1 Barn. & Ad. 158; *Bottomly v. Fairfax*, 1 P. Wms. 334; S. C. 2 Vern. 751; *Fothergill v. Kendrick*, 2 Vern. 234; 2 Black. Com. 341.]

(p) Law of Ex. 39.

(q) Swin. a. 457; 2 Bac. Abr. 434. [As to the three kinds of securities by statute: 1, statute merchant; 2, statute staple; 3, recognizances in nature of statute staple; see Bac. Abr. Executor, 331.—Ed.]

(r) Swin. a. 457.

(s) Ibid.

(t) Treat. of Eq. 112.

(u) 2 Vern. 524.

(x) *Heames v. Bance*, 3 Atk. 630

(Lord Hardwicke.)

(y) *Troughton v. Troughton*, 3 Atk. 659.

liable to the bond. And the same rule will hold as to a devisee of the mortgaged premises (z).

[It should seem that where there is no covenant or bond for payment of the money, the debt will rank only as a debt by simple contract (a).—ED.]

Rent, Bonds,
and other
Obligations.

Next, debts by specialty, as those by bonds or other obligations, sealed by the testator (b).

Also rent arrear and unpaid by the testator, is equal to a debt by specialty; for this savouring of the realty, the executor can no more wage his law against such a debt than he can to a debt by specialty (c).

So where a debt was brought against an executor for rent reserved on a parol lease, after the lease was determined, and the executor pleaded that the testator entered into an obligation, and that he had not assets above 5*l.*, which were not sufficient to discharge this obligation; on demurrer it was resolved, that this rent, though reserved on a parol lease, was yet equal to an obligation, and that it still remained in the realty, though the term was determined (d).

Also, by the custom of London, if a citizen of London dies indebted by *simple contract*, such debt is equal to a debt by specialty (e).

Parker v. Harvey (f), E., 1715. The grantor's *covenant* in a marriage settlement for him and his heirs, that the premises were free from incumbrances, shall come in equally with creditors on bond.

If two men are *partners* in trade, and one of them gives a bond to leave his wife 1000*l.*, and dies, and the other partner administers; if the wife would be paid out of the separate estate of her husband, on there being effects, she shall have a preference before other creditors; but if there is no separate estate, and the wife would have satisfaction out of the partnership effects, then all the partnership debts must be first paid (g).

Voluntary
Bond.

Any *voluntary* bond is good against an executor or administrator, unless some creditor be thereby deprived of his debt. Indeed, if the bond be merely voluntary, a real debt (though by simple contract only) shall have the preference. But if there be no debt at all, then a bond, however voluntary, must be paid by an executor (h).

(z) 3 Atk. 630, 659.

(a) [Coote on Mortgages, 509.]

(b) 2 Bac. Abr. 434.

(c) Ibid.

(d) 2 Bac. Abr. 434; [Willott v. Earle, 1 Vern. 490; Philips v. Lee, 1 Freem. 262; Thompson v. Thompson, 9 Price, 464; as to rent in arrear after death of testator, see Wentw. Off. Ex. 286, 14th edit.—ED.]

(e) 2 Bac. Abr. 434; [but *quære*, whether this be sound law, *Masters v. Lewis*, 1 Lord Raym. 57; *Scudamore v. Hearn*, Andrews, 340, but it is recognized by Hobart, C. J., in *Day v. Savadge*, Hob. 86; see *Snelling v. Norton*, Cro. Eliz. 409.—ED.]

(f) Vin. Exec. O. a. 39.

(g) 3 P. Wms. 182.

(h) 3 P. Wms. 222; *Lechmere v. Carlisle*, Com. 255.

A man, having a wife who lived separate from him, afterwards married another woman who knew nothing of the former wife's being alive, but it being discovered to the second wife that the former was alive, the husband, (in order to prevail with the second wife to stay with him), some years afterwards gave a bond to a trustee of the second wife to leave her 1000*l.* at his death, and died not leaving assets to pay his simple contract debts. If this bond had been given immediately on the discovery, and they had parted thereupon, it had been good; but being given in trust for the second wife, after such time as she knew the first was living, and to induce her to continue with the husband, this was worse than a voluntary bond, and decreed to be postponed to all the simple contract debts. But if such bond had been given to the second wife as a recompence for the injury done her, and thereupon she had left the husband, it had been a good bond, and to be paid before any simple contract debts (*i*).

Voluntary
Bond.

If there be *divers* obligations of the like kind, it seemeth to be in the power of the executor to discharge which obligation and to gratify which of the creditors he will; which being done, the other creditors are without remedy, if there be no assets, unless the day of payment in the one obligation (as was observed before) be expired, and the day of payment of the other obligation is not yet come, in which case the former obligation is to be first satisfied; or unless there be suit commenced for some obligation, for then it is not in the power of the executor to discharge another obligation for which no action is brought in prejudice of the former suit. But an executor may confess judgment on one obligation, and plead that judgment to an action brought on another obligation. And if there be two obligations, and the two several creditors bring several actions against the executor, he that first obtaineth judgment must be first satisfied (*k*).

Where there
are divers
Obligations
of the same
kind.

Although the executors are not named in an obligation, yet the law will charge them, for that they represent the estate of the testator; and the law is the same of administrators. But the heir shall not at any time be charged without express mention of the heir (*l*).

Debts by simple contract are postponed to all others, being debts of an inferior nature; yet an executor is bound, as far

Simple Con-
tract (*m*).

(*i*) *Lady Cor's case*, 3 P. Wms. 339, 349; [see also *Jones v. Powell*, 1 Eq. Cas. Abr. 84, pl. 2; *Cray v. Rooke*, Cas. temp. Talb. 156; *Loeffes v. Lewen*, Prec. Chanc. 370; *Lomos v. Wright*, 2 M. & K. 769; *Edwards v. Edwards*, 2 Cr. & Mees. 612; *Tanner v. Byne*, 1 Sim. 160, case of a post-nuptial settlement.—Ed.]

(*k*) Swin. 457, 458; 2 Bac. Abr. 434, 435; [*Lyttelton v. Cross*, 3 B. & C. 322, as to how far proceedings commenced at law or equity may control this power of preference in the executor, *vide post*, p. 346.—Ed.]

(*l*) Dyer, 23.

(*m*) [See on this subject, 1 Bac. Abr. 80, tit. Executors, (L) 2.]

as he hath assets, to pay them, as much as any other debt ; and therefore a simple contract creditor need not allege that the executor had assets to satisfy debts of a superior nature, and his also ; but if the truth be that the executor hath only assets sufficient to satisfy such superior debts, he must plead it (*n*).

29 Car. 2,
c. 3.

But by the 29 Car. 2, c. 3, s. 4, "No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

Construction
of.

[It has been settled that the word agreement in this section means the *consideration* of the promise (*o*), which, as well as the promise itself, must be in writing, otherwise the agreement is void (*p*). Nevertheless, the consideration need not be stated in *express* terms, but the injunction of the statute will be held to be satisfied if it can be collected from the whole tenour of the writing (*q*).—ED.]

But albeit the law requires that debts should be paid according to their superiority as herein set forth, yet may an executor pay a debt on a simple contract before a specialty, if he hath no notice of such specialty ; for otherwise it might be in the power of the obligee to ruin the executor by keeping his bond in his pocket until the executor shall have paid away all the assets in discharging simple contract debts (*r*).

But of debts upon record, the executor ought to take notice at his peril (*s*).

Dilapidations.

[Degge says (*t*), that damages for dilapidations payable by the executor or administrator of the late incumbent of a benefice to his successor, are to be postponed in order of payment of the debts of the deceased of every description.—ED.]

And in the case of *Greenwood v. Brudnish* (*u*), T., 1720. A man mortgaged his lands, and gave a bond to perform covenants, and after died intestate. His widow, *without* taking letters of administration, possessed herself of his personal estate, and paid it all away in satisfying debts on simple contract. About seven years after an old dormant entail was discovered, and the heir in tail brought an ejectment, and recovered pos-

(*n*) 2 Bac. Abr. 434.

(*o*) [1 Saund. 211, note 2.]

(*p*) [Wain v. Warlters, 5 East, 10.]

(*q*) [Stadt v. Lill, 9 East, 348 ; Bateman v. Phillips, 15 East, 227 ; Russell v. Moseley, 1 Brod. & Bing. 211 ; S.C. 2 Moore, 521 ; Stead v. Liddard, 1 Bing. 196 ; S.C. 8 Moore,

2 ; see Mr. V. Williams "Of the Liability of an Executor or Administrator on his own Contracts," vol. ii. p. 1389.—ED.]

(*r*) 2 Bac. Abr. 434, 435.

(*s*) 2 Bac. Abr. 435 ; [Vide ante, note (*a*), p. 470.]

(*t*) [Parson's Counsellor, p. 91.]

(*u*) Prec. Cha. 534.

session. Whereupon the mortgagee sued the widow upon the bond. She brought a bill for an injunction, having paid away all the testator's assets before any notice of this bond, and therefore alleged that she ought not to be chargeable with a *devastavit*. The defendant demurred, and the demurrer was clearly allowed, the bill being an attempt to alter the course of law. But if any extraordinary fraud had been charged on the defendant, by which she had been deceived or induced to pay the assets, that might have varied the case.

Damages in an action against Testator recoverable against Executor.

[The damages recovered in an action against an executor or administrator under section 2 of 3 & 4 Will. 4, c. 42, in respect of an injury to property real or personal by the testator committed six months before his death, "shall be payable in like order of administration as the simple contract debts of such person (x).—ED.]

Generally, if the debts are in *equal degree*, the executor may give the preference unto which he will (y).

What Debts to be first satisfied. Retainer by Executor.

So that if all the goods are but 20*l.* and debts are due to two by obligation, each of 20*l.*, the executor may pay which of them two he will (z).

But in this case the Chancery will sometimes interpose, because this power may be an inlet to fraud (a).

In like manner the executor may allow unto himself his own debt in prejudice of other debts of equal degree; provided that he hath made an inventory, and provided he be not executor of his own wrong (b). But an executor of his own wrong shall not in any case be permitted to retain (c).

And this remedy of retainer is by mere act of law, and grounded upon this reason, that the executor cannot, without an apparent absurdity, commence a suit against himself as representative of the deceased, to recover that which is due to him in his own private capacity; but, having the whole personal estate in his hands, so much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose. Else, by being made executor, he would be put in worse condition than all the rest of the world besides. For, though a rateable payment of all the debts of the deceased, in equal degree, is clearly the most equitable method, yet as every scheme for a proportionable distribution of the assets among all the creditors hath been hitherto found to be impracticable, and productive of more mischiefs than it would remedy, so that the creditor who first commenceth his suit is entitled to a preference in payment, it follows, that as the executor can commence no

(x) [The action must be brought within six months after the executors or administrators have legally clothed themselves with the character of personal representative to the deceased. —ED.]

(y) 10 Mod. 496.

(z) Br. Executor, 172.

(a) 10 Mod. 496.

(b) Swin. 459; 2 Bac. Abr. 435.

(c) 3 Blackst. b. 3, c. 2.

Retainer by
Executor.

suit, he must be paid the last of any, and of course must lose his debt, in case the estate of his testator should prove insolvent, unless he be allowed to retain it. But the executor shall not retain his own debt in prejudice to those of a higher degree, for the law only puts him in the same situation as if he had sued himself as executor, and recovered his debt, which he never could be supposed to have done, while debts of a higher nature subsisted (*d*).

[And this privilege of an executor to retain for his own debt exists after a decree for an account has been made (*e*). Nor is it lost by the fact of his having paid into court, in a creditor's suit, the money which has been received on account of the assets of the deceased (*f*).—ED.]

In debt on bond against an administrator, to which he pleads debt on bond due to himself and retainer, it is not necessary to aver a good consideration for the bond, for if it can be impeached, the matter must be replied. Nor is it necessary for the administrator to set out in his plea the letters of administration, for the plaintiff by bringing the action has admitted him to be lawful administrator (*g*).

But if the debt of one creditor be payable at a future day, and of another creditor presently, the executor cannot prefer such future debt, and pay it before the day of payment comes, and leave the other unpaid. But after the day happens, he may prefer either, unless in case of a suit commenced before the day (*h*).

Executor or
Administrator may not
prefer his
own Debt be-
fore another
Executor or
Administra-
tor.

But amongst executors themselves, or joint administrators, one executor or administrator may not prefer his own debt before the debt of another executor or administrator, being in equal degree. Thus in the case of *Chapman v. Turner*, in Chancery, Feb. 26, 1738, two bond creditors, A. and B., took joint letters of administration; A. got into his hands best part of the assets, and retained for his own debt against B. On a bill for an account, the question was, whether A. by this had got such a legal advantage as to be entitled to keep the assets, and so B. lose his debt? By the Master of the Rolls: *The rule of this court in cases of retainer is, unless the party can show a legal cause to retain, we never give it him; if he can show a legal right, we never take it from him.* The question then is, whether at law this be a good retainer? At law, no doubt, an executor or administrator hath a right, in case of debts in equal degree, to prefer one to another, and to retain for his own in the first place against any other creditor; and

Practice of
the Court of
Equity with
respect to Re-
tainer.

(*d*) 3 Bla. b. 3, c. 3; [2 Bla. Com. 511; Toller, 295.]

(*e*) [*Nunn v. Barlow*, 1 Sim. & Stu. 588.]

(*f*) [*Chissum v. Dewes*, 5 Russ. 29; *Langton v. Higgs*, 5 Sim. 228.]

See Vaughan Williams on Ex. & Ad. vol. ii. p. 835.]

(*g*) *Picard v. Brown*, 6 T. Rep. 550.

(*h*) Went. 142.

the reason is, because if a retainer were not allowed, an executor, in case of a deficiency of assets, would have no possible way of obtaining satisfaction for his debt; for at law there is no such thing as splitting of debt, or making a rateable proportion, and therefore he cannot come in upon an average with the rest of the creditors, nor has the advantage of another creditor, who by bringing his action in due time may recover his debt, though there be not enough assets at last to answer all demands upon the testator, for he cannot sue himself. So that *this privilege of retainer is founded on the policy of the common law, that executors may not be deprived of one advantage without having another in lieu of it, and that they may not be in a worse condition than all mankind besides.* But this is not a case between an executor or administrator and a creditor, but between two joint administrators, who are both in the same condition in all respects. No authority hath been cited in this case to support a retainer by one administrator against the other, nor do I see how there ever could be one, because an administrator can bring no sort of action against his companion, wherein this point might have been settled at law. Neither doth the reason of the law justify such a retainer, for administrators are considered but as one person in law; the possession of the one is the possession of the other; the receipt of one is the receipt of the other; and therefore the retainer of one must be considered as the retainer of the other, and must enure for their mutual benefit in the discharge of the debts of both in proportion. Then the consequence would be very bad, were a retainer allowable in this case; for administrators must fight for the assets, if getting the sole possession would entitle either to a separate right in them. So that, as no legal right of retainer has been shown, the rule must take place, that he who cannot retain in law, cannot in equity. The plaintiff is entitled to an equal distribution of the assets, being an equal creditor, according to conscience and equity; and the defendant must be decreed to account (i).

A right of retainer is not prejudiced by the circumstance that the administration is granted to another for the use of the creditor, a *lunatic*, nor that it is granted to another *durante minoritate*, nor that the debt is due to a *trustee* (k).

Another difference, where debts are in equal degree, is said to be, that regularly that debt shall be paid first for which suit is commenced, and not that for which no suit is commenced; for after a suit begun, the executor, it hath been holden, may not excuse himself by any voluntary payments (l).

Yet it is said that the executor, before notice of such suit,

Chapman
v.
Turner.

Executor or Administrator may not prefer his own Debt before another Executor or Administrator.

When an Executor may prefer a Debt.

(i) Viner, tit. Executors, D. 2.

(l) Jolley v. Gower, 2 Cha. Ca.

(k) Franks v. Cooper, 4 Ves. 763. 201; 2 Vern. 62.

may pay any other creditor in equal degree, and then plead that he hath fully administered before notice (*m*).

And in the case of *Mason v. Williams* (*n*), it was held by Cowper, Lord Chancellor, that pending a bill in equity against an executor, or after a degree *quod computet*, an executor may pay any other debt of a higher nature, or as high a nature, if there be *legal* assets; but if he hath only *equitable* assets, then the Court of Chancery will not indemnify him, and suffer him to prejudice and disappoint the first suitor.

Confession of an Action by the Executor where there is a real Debt, is a good Plea at Law against another Executor.

If there be two creditors in equal degree, and both sue, if the executor doth by covin help the creditor which began his suit last to his judgment or execution first, and there be no assets left to pay the other creditor, he must be satisfied out of the executor's own estate, if this covin be proved against him. But the confession of an action by the executor, where there is a real debt, is no covin; and such recovery by confession is a good plea for the executor against another creditor (*o*).

But where debt on bond was brought against an administrator, and he pleaded a judgment confessed to an action on a simple contract, without averring "that he had no notice of the plaintiff's demand," the plea was holden to be bad, because it would enable an administrator, in many cases, to defeat a specialty creditor by confessing as many judgments as he pleased on simple contract debts (*p*).

A Decree of a Court of Equity is equal to a Judgment at Law against an Executor.

In the case of *Joseph v. Mott*, M., 1697 (*q*), a man made his will, and died indebted to several persons by bond, more than his personal estate would pay. A bond creditor brought a bill against the executor, to have a discovery and account of the personal estate, and a satisfaction for his debt. At the hearing the executor made default; so there was a decree against him for an account and satisfaction out of the assets, unless cause showed. Before the decree was made absolute, another bond creditor of the testator brought an action at law against the executor upon a bond. He appeared, and because he could not plead this decree at law, suffered judgment to go against him by default. And the account being carried on before the master, it was doubted whether he should allow this judgment on the account. The Master of the Rolls was of opinion that the decree must be preferred. And it coming to be reheard before the Lord Chancellor, he was of the same opinion.

Whether an Executor, after Bill filed, can voluntarily pay another Creditor of equal Degree.

But in the case of *Darston v. The Earl of Orford*, H., 1701 (*r*), after a bill filed in Chancery against an executor for a discovery of assets, and answer put in, then executor *voluntarily* paid a bond debt without suit. The cause proceeded to a hearing, and an account was decreed; and the

(*m*) Br. Executors, 43; Went. 146.

(*n*) 2 Salk. 507.

(*o*) Swin. a. 459.

(*p*) *Sawyer v. Mercer*, 1 T. R. 690.

(*q*) Prec. Ch. 79.

(*r*) Pre. Cha. 188; 3 P. Wms. 401.

question was, whether this voluntary payment, pending a suit here, should be allowed on the account; and the Lord Keeper Wright thought the payment ought to be allowed; but this being a point of consequence, he ordered precedents to be searched. Afterwards, 3rd June, 1702, on precedents produced on both sides, his lordship seemed to be of the same opinion, but said the case of *Joseph v. Mott* was a precedent against him, but thought that to be a direct change of the law. The next day (upon consideration of the precedents) his lordship said he was bound up by them, and therefore decreed the payment (being voluntary) to be disallowed, but seemed to disapprove of the case of *Joseph v. Mott*, where the judgment at law was fairly obtained. Afterwards, 21st November, 1702, this decree was reversed in the House of Lords, and the payment allowed. [In *Maltby v. Russell*, Sir J. Leach thought himself bound by this judgment of the House of Lords (r).—ED.]

So in the case of *Waring v. Danvers*, M., 1715 (s), the plaintiff, a simple contract creditor of the testator, brings an action on a special original against the executor, in order to recover his debt. The other simple contract creditors offered the plaintiff to come in for his proportion of his debt with them; but having first filed his original, he insisted on his whole debt in preference to the rest: upon which the executor and the other simple contract creditors entered into articles, agreeing that first the executor should be paid his debts, and then that all the simple contract creditors should equally share the assets amongst them, exclusive of the plaintiff. And in order to bar the plaintiff at law, the executor gave judgment in the several *quantum meruits* brought by the other simple contract creditors for the several sums which were laid as damages in the declarations, without ascertaining the damages by writ of inquiry; but those damages were so laid as not to exceed the real debt. Upon this the plaintiff brought his bill. But the master of the rolls dismissed the bill without costs, it being a hard case; but afterwards, on consideration, he gave costs: and the decree was affirmed by the lord chancellor. The master of the rolls said, if the plaintiff desired it, he would send it to the master to see whether the judgments confessed to the other creditors be more than their real debts; but the plaintiff not thinking it worth his while, the court decreed as above.

In the case of *Barker v. Dumeres*, Jan. 29th, 1740 (t), Robert Dumeres died intestate, and on his death Edward Dumeres, who was a relation of his, applied for administration. Barker, who was a creditor of Robert by bond, opposed the granting of the administration to Edward, by reason of his insufficiency

Where a Creditor sues an Executor both at Law and Equity at the same Time, he shall not be

(r) [2 Sim. & Stu. 227.]
(s) 1 P. Wms. 295.

(t) Barn. Cha. Ca. 277.

put to his
Election ac-
cording to
the general
Rule.

and his intention of going over to Jersey. However, administration was granted to him. This administration was in some measure granted to Edward by the leave of this court. Barker had entered a caveat against its being granted to him, though that caveat was afterwards withdrawn. But as there were these objections against him, Barker filed his bill against him the 31st of October last, for the payment of his debt, and prayed that he might give security to abide that determination. His answer came on the 27th of the next month, and an order was made that he should find such security, which he accordingly did. After this, Merry, who was another bond creditor to the intestate, brought his action at law against Edward, and Edward confessed a judgment to him in Michaelmas Term in that same year in 4000*l*. This occasioned Barker's bringing his action at law against Edward, upon the same bond for which the bill was brought here, in order that Edward might not confess judgment to other persons before he could get judgment against him. As soon as this action was brought, a motion was made on the part of Edward, praying that Barker might make his election which court he would proceed in, whether at law or in equity. By the Lord Chancellor Hardwicke: "It is very true that it is the general rule of this court that a person shall not be allowed to proceed both at law and in equity for one and the same demand at one and the same time. But notwithstanding that, it is as certain that by the ancient course of the court a person was allowed to bring his action at law against the representative of the deceased, and at the same time to bring his bill here in order to have a discovery of assets; though now it is established that if the party proceeds in equity against such representative, his bill must be both for a discovery of assets and a satisfaction for his debt; and he shall not be allowed to proceed both at law and in equity: and where the party has proceeded in both courts, several orders have been requiring him to make his election: but where the court sees that the representative is confessing judgments, that is a reason (and in my judgment shall always be a reason) that the court will not require the party to make his election. The courts of law distinguish the case of executors, in instances similar to this, from other cases. Therefore, though the constant course of those courts is on reasonable circumstances to give a defendant farther time to plead than he is obliged to plead in by the strict rule of the court, yet when an executor applies for this favour, the time for pleading shall not be enlarged but by his consenting not to confess judgments in the mean time. It is indeed true that an executor in some instances may honestly confess judgments to other creditors; as where he does it to prevent his being doubly charged, or the like: but when this court sees that he doth this in order to elude its orders, the court will never per-

mit it. Now what is the nature of the present case? The original bill was filed the 31st of October last. The answer of Edward came in on the 27th of November following: and in the beginning of Michaelmas Term here is a judgment confessed by Edward to Merry in 4000*l*. The administration itself was in some measure granted to Edward by leave of this court. Barker had entered a caveat against its being granted to him, though that caveat was afterwards withdrawn. The proper order for the court to make in this case is, that Barker made a special election, namely, to proceed at law to recover judgment there, and to proceed in this court for a discovery and an account of assets, but that he shall not be at liberty to take out execution upon the judgment without leave of this court." And it was ordered accordingly (*x*).

A person indebted by bond and simple contract deviseth *lands to trustees* to be sold for payment of his debts: it was resolved and declared to be the constant rule, that the creditors should have in proportion, and not the bonds to be first satisfied; for it shall be construed that (one of them being as much a debt as the other) the testator intended they should all be paid alike; and if the value of the land fall short, they shall be satisfied in proportion. So legatees shall have equal proportion *pro ratâ* according to the greatness or smallness of the legacy, for the land is made debtor: but otherwise it is of *judgments*, for these do affect the land by their own strength and nature, and would have had the preference whether such devise had been made or not (*y*).

Legal Assets must be administered in due course of Law, but equitable Assets pari passu without regard to Priority.

But if a man only charge his lands with the payment of debts, so that the lands descend subject to them, bonds shall be preferred to simple contract debts (*z*).

A man deviseth his lands to two persons in trust to be sold for payment of his debts, and maketh the same persons *executors*. The question was, whether bond debts should have a preference, or all debts be paid *pari passu*? The difference was taken when the same persons that are trustees to sell the lands are executors likewise, and where not; for in the former case, after the land is sold it is assets even *at law*, and therefore to decree them to pay otherwise than according to the legal course, would be to decree a *devastavit*: and in this case it was decreed that bond debts must be preferred (*a*).

But in the case of *Lewin v. Okely*, July 26th, 1740 (*b*), where there was a devise to trustees for the payment of debts, and the same persons were made executors, it was held by Lord Hardwicke, that this shall be equitable and not legal

(*x*) [See Vaughan Williams's Ex. & Ad. vol. ii. p. 829.]

(*y*) *Foly's case*, 2 Freem. 49; *Gosport's case*, id. 175.

(*z*) *Freemouth v. Dedire*, 1 P. Wms. 430.

(*a*) *Clutterback v. Smith*, Pre. Ch. 127.

(*b*) 2 Atk. 50; [*vide supra*, p. 394.]

assets, and all the creditors must be paid *pari passu*. There have been cases (he said) in which it was held that where trustees are made executors, debts shall be paid in a course of administration, but the modern resolutions have been otherwise.

A *lease* for years, or a bond or grant of an *annuity* taken in a trustee's name, being *personal* assets, shall be applied in a course of administration, and not for the payment of all the debts equally (c).

If a man possessed of a term for years mortgageth it and dies, leaving debts, some by bond and some by simple contract, the *equity of redemption* is *equitable assets*, and shall be liable to all the debts equally (d).

An equity of redemption of a mortgage in fee is not equitable assets as against judgment creditors who have a right to redeem (e). And assets are not marshalled against judgment creditors (f).

Distinction
between
legal and
equitable
Assets.

And the distinction seemeth to be this: Where there are *legal* assets, that is, assets which are liable at law without the help of equity, there the executor may apply them according to the course of law, which allows and requires a preference to be made in certain cases as hath been mentioned; but where there are only *equitable* assets, that is, assets which are not liable without the help of a court of equity, in such case the court will direct the application thereof according to that course which is most equitable and just, namely, to pay every creditor his share in proportion.

So where the assets are *partly legal* and *partly equitable*, although equity cannot take away the legal preference on legal assets, yet where one creditor has been partly paid out of such legal assets, when satisfaction comes to be made out of equitable assets, the court will postpone him till there is an equality in satisfaction to all the other creditors out of the equitable assets, proportionable to so much as the legal creditor has been satisfied out of the legal assets (g).

That the court leans to construe assets equitable rather than legal, *vide supra*.

(c) *Watson v. Fielding* (Lord Maclesfield), 2 Vern. 764.

(d) 3 P. Wms. 341. [*The Creditors of Sir C. Cox*, per Sir J. Jekyll. Lord Hardwicke held the same in *Hartwell v. Chitters*, Ambl. 308; and both these judgments are relied upon by Mr. Justice Bayley in *Clay v. Willis*, 1 B. & C. 372; and *Clay v. Willis* is relied upon by Lord Tenterden in *Barker v. May*, 9 B. & C. 493; S. C. M. & R. 338; and therefore it should seem that the dictum of Mitford, So-

licitor-General, in arguing *Sharpe v. Earl of Scarborough*, 4 Ves. 538; and Mr. Cox's note to his edition of Peere Williams, vol. iii. p. 344, impugning the law of *The Creditors of Sir C. Cox* and *Hartwell v. Chitters*, need not be attended to.—ED.]

(e) *Sharpe v. The Earl of Scarborough*, 4 Ves. 538.

(f) *Ibid.*

(g) *Morrice v. Bank of England*, Cha. Ca. Talb. 220; 2 Vern. 435.

As debts upon judgments, recognizances, mortgages, bonds and other like specialties, shall carry interest, so also interest hath been allowed upon demands due by *covenant*, although it was objected that they were not liquidated, and only found in damages (*i*).

In what Cases
Interest shall
be allowed
(*h*).

Where a man prays satisfaction for a *simple contract* debt, merely out of *personal* assets, a court of equity will of course direct the debt to be paid with interest to be computed from one year after the testator's death (*k*).

But where a *real* estate is charged with the payment of debts as well as the personal, the Lord Chancellor Hardwicke said he did not know that it was absolutely fixed that simple contract debts should carry interest from that time; and he believed, if the decrees of the court were looked into, it would be found that a great many of them are in this form, that the master should take an account of the value of the estate and of the debts, that he should compute interest upon such of the debts as carry interest, without giving any direction that interest should be computed upon the other debts (*l*).

Where a man *devises his land for the payment of his debts*, it is said that this devise makes the land as a security or mortgage for all the testator's debts, as well those by simple contract as otherwise; and the simple contract debts shall carry interest, as the land, which is the fund, yields annual profits: By Lord Chancellor Macclesfield, who said that this was the daily practice (*m*).

But where a real estate is *charged* only with the payment of debts, the Lord Chancellor Hardwicke seemed to think that this will not make the simple contract debts to carry interest. And he said that on a general devise of lands for the payment of debts, he should think that simple contract debts ought not to carry interest (*n*).

The arrears of an *annuity* or rent charge are never decreed to be paid with interest where the sum is uncertain, but only where it is certain and fixed (*o*).

In the case of *Litton v. Litton*, T., 1719 (*p*), interest of an annuity was decreed by the lord chancellor from the very day it became due. But Mr. Peere Williams adds a *quære* as to this, and says it seems the arrears should carry interest only from the first day of payment next after the arrears of the annuity became due; if payable half-yearly, then from the

(*h*) [As to the cases in which executors are charged with interest, see Mr. Vaughan Williams, vol. ii. p. 1447.]

(*i*) Viner, Interest, C.

(*k*) Barnard. 229.

(*l*) Ibid.

(*m*) 2 P. Wms. 26.

(*n*) Barnard, 230. [As to when the arrears of an annuity are apportionable at common law, see Mr. Vaughan Williams on Ex. & Adm. vol. i. p. 664, 3rd edit.]

(*o*) Cas. Talb. 2.

(*p*) 1 P. Wms. 541.

next half-year day; if quarterly, then from the next quarter day; and so has been the common rule in these cases.

Upon a deficiency of assets a value must be set on an annuity at the time of the death, and the annuitant can claim only in that respect (*q*).

Debt barred
by the Statute
of Limita-
tions.

Staggers v. Welby, T., 1700 (*r*), at the lord chancellor's house, it was held by Cowper, Lord Chancellor, that if one by will subject his lands to the payment of his debts, debts barred by the statute of limitations shall be paid; for they are debts in equity, and the duty remains; the statute hath not extinguished it, though it hath taken away the remedy.

Blakeway v. The Earl of Strafford (*s*), T., 1726. In 1707, Sir Henry Johnson was indebted to Blakeway in 343*l*. In 1714 he received 50*l*. in part. In 1719, Sir Henry died, having made his will and devised his lands to his executors, in trust to pay his debts. The executors renouncing, the Earl of Strafford administered with the will annexed. Blakeway brought his bill to be paid out of the assets. The Earl of Strafford pleaded the statute of limitations, and that neither he nor (as he believed) Sir Henry made any promise to pay the debt within six years before the bill brought. Lord Chancellor: "I would be cautious in giving any relief against an act of parliament; but it is plain the debt is not extinguished by the statute of limitations, since the statute must be pleaded, which the defendant is not bound to do; and if he afterwards will acknowledge the debt, it takes it out of the statute:" and his lordship over-ruled the plea. Upon appeal brought in the House of Lords, this decree was reversed, and the plea ordered to stand for an answer. But with liberty to except, and saving the benefit of the plea to the defendant till the hearing of the cause (*t*). And the like order was made in *Jones v. Earl of Strafford* (*u*). But no farther proceedings appear to have been had in either case (*v*). The point is, however, considered as settled by Lord Mansfield, who expresses himself thus in *Trueman v. Fenton* (*x*): "Where a man devises his estates for payment of his debts, a court of equity says (and a court of law in a case properly before them would say the same), all debts barred by the statute of limitations shall come in and share the benefit of the devise, because they are due in conscience; therefore, though barred by law, they shall be held to be revived, and charged by the bequest (*y*)."

But if the debtor by his will directs that *all his debts* shall be paid, or makes any provision for the payment of his debts

(*q*) *Franks v. Cooper*, 4 Ves. 763.

(*r*) 1 Salk. 154; 2 Vern. 374.

(*s*) 2 P. Wms. 373.

(*t*) 3 Bro. P. C. 305.

(*u*) 3 P. Wms. 89.

(*v*) See Mr. Cox's notes, *ubi supra*.

(*x*) Cowp. 548.

(*y*) See also *Lacon v. Briggs*, 3 Atk. 107.

in general, this will revive it, and bring it out of the statute, and make his executors liable (z).

So if the debtor, upon application for that particular debt, acknowledges and promises payment (for a bare acknowledgment is not sufficient), this will bring it out of the statute; for the acknowledgment and promise is a new evidence of the debt (a).

But in the case of *Norton v. Frecker*, H., 1737 (b), it was said by the Lord Chancellor Hardwicke, that an executor is not *compellable*, either in law or equity, to take advantage of the statute of limitations, against a demand otherwise well founded.

[But it is competent to any person interested in the fund, to take advantage of the statute against a creditor, notwithstanding the refusal of the executor (c).—ED.]

Where a testator is much indebted, and the executor is desirous to be rid of the assets, the executor's safest way is, to file a bill in Chancery against the creditors, to the end they may, if they will, contest each other's debts, and dispute who ought to be preferred in payment (d).

Executor may file a Bill, to determine priority of Payment.

[Lord Talbot, however, said: "As to bills of conformity, indeed, the case of *Buckle v. Atlee* is a case where they have been allowed, but they have been since discountenanced; and the reason is, because this court is satisfied that they have no right to take away the preference that one creditor has over another by his legal diligence (e); but as for the practice of allowing *friendly bills* to be filed against executors and administrators, see Mr. Vaughan Williams on Executors and Administrators, vol. i. p. 1505.—ED.]

In debt against an executor, if the defendant plead fully administered; if any assets be found in his hands, although there be not to the value of the debt; yet the plaintiff shall have judgment for his whole debt of the goods of the testator (f).

Plea of *plene administravit*.

The judgment in such case used to be against the executor for the whole debt and damages, to be levied *de bonis testatoris et si non*, &c., the damages *de bonis propriis* (g). But in *Harrison v. Beccles* (h), Lord Mansfield, with the assent of the other judges, would not suffer the plaintiff to recover of the executor more than the assets in his hands, with judgment *quando acciderint* for the residue. But if to an action on a

(z) Prec. Ca. 385.

(a) Ibid.

(b) 1 Atk. 526.

(c) [*Shewen v. Vandenhorst*, 1 Russ. & M. 349, Sir J. Leach; confirmed on appeal by Lord Brougham, 2 Russ. & M. 75. See 3 & 4 Will. 4, c. 27, ss. 40, 41, 42, *post*, p. 493.]

(d) *Buckle v. Atlee*, 2 Vern. 37; Fonbl. Tr. Eq. 6, 4, pt. 2, c. 2, s. 3, n. (a).

(e) [*Morrice v. Bank of England*, Cas. temp. Talbot, 224.]

(f) 1 Rolle's Abr. 929.

(g) Lil. Entr. 504.

(h) 3 Term Rep. 688.

bond the executor plead *payment* and *non est factum*, but omit to plead *plene administravit*, and a verdict and judgment be had against him, this amounts to a confession of assets, and to an action of debt upon that judgment suggesting a *devastavit*, he cannot plead that he has fully administered, but will be liable for both debt and damages *de bonis propriis* (i). So if a person bind himself *as administrator*, to abide by an award to be made, touching matters in dispute between his intestate and another, and the arbitrators award that he, *as administrator*, should pay, he cannot plead *plene administravit* to debt on the bond; for by submitting to such an award, he has admitted assets (k). But a mere general *submission* to an award by an administrator is not of itself an admission of assets (l). In *Worthington v. Barlow* (m), Lord Kenyon held, that if an arbitrator award a payment by an administrator, it is equivalent to determining that he has assets. If an executor plead that he has fully administered, and that the plaintiff does not take issue on that plea, but takes judgment of assets *quando acciderint*, on a *scire facias* on that judgment, he can only have execution of such assets as shall have come to the executor's hands since the judgment. But if it appear to the court on affidavit, that assets have come to the executor's hands, between the purchasing of the original writ and the judgment, the court will permit the plaintiff to enter up his judgment in such a manner as to reach them, except the executor can show that some injustice will thereby be done him, as in case he should have fairly paid other debts in the interval (n). In Chancery, if a plaintiff pray an account, or procure a receiver to be appointed, this is a waiver of an admission of assets (o).

[An executor is bound to plead a debt of a higher nature of which he has notice in an action brought against him for a debt of an inferior nature; and *riens ultra*, if he has not assets for both (p). This plea is called *plene administravit præter* (q). —ED.]

But if it be found, that he had nothing in hands, the judgment shall be, that the plaintiff shall take nothing by the writ, and shall not have judgment of the debt: for he hath waived this advantage by taking of the issue, and judgment is to be given upon the verdict (r). For here the plaintiff might have

(i) See *Erving v. Peters*, 3 Term Rep. 685; *Rock v. Leighton*, *ibid.* 690; [1 Salk. 310; *Leonard v. Simpson*, 2 Bing. N. C. 176; S. C. 2 Scott, 335.]

(k) *Barry v. Rush*, 1 Term Rep. 691.

(l) *Pearson v. Henry*, 5 Term Rep. 6; *vide supra*.

(m) 7 Term Rep. 453.

(n) *Mara v. Quin*, 6 Term Rep. 1.

(o) *Wall v. Bushby*, 1 Bro. 484.

(p) [*Rock v. Leighton*, 1 Salk. 310, cited above; *Britton v. Bathurst*, 3 Lev. 114; *Lemun v. Foolce*, *ibid.* 57.]

(q) [1 Saund. 219 b, note to *Wheatley v. Lane*.]

(r) 1 Rolle's Abr. 929.

had judgment for the debt of the goods of the testator which might hereafter come to be administered (s).

If an executor plead *ne unque executor*, and is found executor, the judgment shall be general, to recover the debt, for his false plea (t). Plea of *ne unque Executor*.

In an action of debt against an executor, who pleadeth that he is not executor, nor even administered as executor, and this is found against him, the judgment shall be of the goods of the testator, if there are any such; if not, of his own goods, as well for the debt, as for the damages and costs (u).

An executor shall not be forced to pay legacies, until the legatees shall give bond to refund in proportion, or in the whole, for the satisfaction of debts, if any shall appear unsatisfied (x). Debts to be paid before Legacies.

For debts are to be paid before legacies: and if the spiritual court will compel an executor to pay a legacy before he pay the testator's debts, a prohibition will lie (y).

But where lands are devised for payment of debts and legacies, and the debts are such as land is not liable to satisfy, as debts by simple contract; there, it is said, the debts shall have no preference of the legacies: but if there be not sufficient to pay all, they shall be paid in proportion (z).

So if a man bind himself in an obligation to perform a certain thing, and deviseth divers legacies, and dieth, leaving only sufficient to satisfy the obligation if this shall come to be forfeited; yet this obligation shall not be any bar of the legacies, because it is uncertain whether the obligation will ever come to be forfeited: but the executor shall make a conditional delivery of the legacy, to wit, that if the obligation shall be recovered against him, the legatee shall redeliver the legacy (a).

When executors pay a sum of money on their testator's account, which was not due, in an action to recover it back, they must declare in their own right, and not as executors; but if the money was due in conscience, such an action will not lie (b).

(s) Lil. Entr. 505.

(t) 1 Rolle's Abr. 930; [Com. Dig. Pleader (2 D. 7.)]

(u) 1 Rolle's Abr. 930; 1 Atk. 293. [What constitutes an executor of his own wrong, *vide supra*, "Probate."]

(x) Cha. Ca. Finch, 136; Viner, Devise, Q. d. 7.

(y) Law of Ex. 182.

(z) 2 Freem. 270.

(a) 1 Rolle's Abr. 928.

(b) *Munt v. Stokes*, 4 Term Rep. 565.



VIII. Of the Payment of Legacies, and Distribution of Intestate's Effects.

1. Concerning the Payment of Legacies	492	2. Concerning the Distribution of Intestate's Effects . . .	526
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1. Concerning the Payment of Legacies.

What Persons are incapable of a Legacy.

By the statutes of the 25 Car. 2, c. 2, and the 1 Geo. 1, st. 2, c. 13, persons required to take the oaths and otherwise qualify themselves for offices, who shall act without such qualification, shall be incapable of any legacy. [And so it should seem are traitors (c).—ED.]

By the 9 & 10 Will. 3, c. 32, persons denying the Trinity, or asserting that there are more Gods than one, or denying the Christian religion to be true, or the Holy Scriptures to be of divine authority, shall for the second offence be incapable of any legacy. [Repealed as to the denial of the Trinity, by 53 Geo. 3, c. 160.—ED.]

And by the 5 Geo. 3, c. 27, artificers going out of the kingdom, and exercising their trades in foreign parts, shall be incapable of any legacy. [Repealed by 5 Geo. 4, c. 97.—ED.]

[An alien friend (d) may be a legatee of personal chattels, but not an alien enemy (e). His legacy is forfeited to the crown.

[Since the decision in *Brett v. Brett* (f), it has been held, that a legacy to a subscribing witness of a mere will or codicil of personalty, is valid; and that the 25 Geo. 2, c. 6, is limited to real estates. But all questions on this subject of wills made after 1st January, 1838, are regulated by 1 Vict. c. 26, s. 15 (g).

[In the case *Doe v. Mills* (h), which was decided on the 25 Geo. 2, c. 6, of which the 1 Vict. c. 26, s. 15, is nearly a transcript, it was held, the statute 25 Geo. 2, c. 6, makes void a devise to an attesting witness, although there be three other attesting witnesses to the will.—ED.]

Ademption or Extinction of Legacies.

A legacy is extinct, by taking a bond for it (i).

Where the *statute of limitation* was pleaded in bar to a legacy demanded, due twenty years before, it was held by the

(c) [2 Black. Com. 512.]

(d) [Calvin's case, 7 Co. 17.]

(e) [Att.-Gen. v. Weedon, Parker, 267.]

(f) [By Sir J. Nicholl, 3 Add. 210, affirmed by Delegates. See note

to 3 Russ. Cha. Ca. 437. Sir W. Grant held a different opinion in *Lees v. Summerhill*, 17 Ves. 508.]

(g) [Vide ante.]

(h) [1 Mood. & Rob. 288.]

(i) Yelv. 39.

lord chancellor, that a legacy is not barred by the statute, nor ever had been so held (*j*).

Ademption
or Extinction
of Legacies.

[But there may be a presumption of payment from permitting the assets to be distributed without claiming the legacy (*k*).

[By 3 & 4 Will. 4, c. 27, it is enacted,

[Sect. 40. "That after the said thirty-first day of December one thousand eight hundred and thirty-three no action or suit or other proceeding shall be brought, to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one, was given (*l*)."

Money
charged upon
Land and
Legacies to
be deemed
satisfied at
the end of
twenty Years
if there shall
be no Interest
paid or Ac-
knowledg-
ment in
Writing in
the mean-
time.

[Sect. 41. "That after the said thirty-first day of December one thousand eight hundred and thirty-three no arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit."

No Arrears
of Dower to
be recovered
for more than
six Years.

[Sect. 42. "That after the said thirty-first day of December one thousand eight hundred and thirty-three no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: Provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years (*m*)."—ED.]

No Arrears
of Rent or
Interest to be
recovered for
more than
six Years.

(*j*) *Anon.* 2 Freem. 22, [per Lord Northington. See also *Parker v. Ash*, 1 Vern. 257.]

& Coll. 200.]

(*k*) [*Campbell v. Graham*, 1 Russ. & M. 453; *Baldwin v. Peach*, 1 Younge & Coll. 438.]

(*m*) [See *Paget v. Foley*, 3 Bing. N.C. 679; *Phillips v. Munnings*, 2 Myl. & Cr. 309; *Berrington v. Evans*, 1 Younge & Coll. 434 (Lord Abinger); *Lord St. John v. Broughton*, 9 Sim. 219; V. Wms. on Ex. & Ad. vol. ii. p. 1602.]

(*l*) [See *Sheppard v. Duke*, 9 Sim. 567; *Prior v. Horniblow*, 2 Younge

Satisfaction
of Portions
by Legacies.

The father by his will gave to his daughter 1000*l.*, to be first paid after his debts, besides a share out of the dividend of his estate. Afterwards, on her marriage, an *agreement* was made, for what she should have out of her father's estate, and that it should be only 1100*l.*, and that was to be in full of what was intended her thereout. It was decreed by the master of the rolls, and confirmed by the lord chancellor, that this was an ademption of the legacy, and that the 1100*l.* was to be in full of what the daughter was to have out of the said estate (*l*).

As an agreement may be a satisfaction of a legacy, so a legacy may be a satisfaction of an agreement; as where a man had one daughter, to whom 8000*l.* was secured by marriage settlement, and afterwards he gave her 8000*l.* by his will for her portion, and 200*l.* per annum. Lord Keeper Harcourt held that the daughter shall have but one 8000*l.*, though she may elect which of the portions she pleases (*m*). So also the bequest of the residue of testator's personal estate to a younger son, being greater than the provision by the father's marriage settlement, was decreed a satisfaction of that portion (*n*). And a legacy has been decreed to go in part satisfaction of a provision by settlement (*o*). But this is question of *intention* (*p*).

But portions for children by the will of a parent are presumed to be a satisfaction of a prior provision by settlement, unless clearly not so intended, and the presumption is not rebutted by slight circumstances (*q*).

A man by his will gave his four daughters 600*l.* a-piece, and afterwards married his eldest daughter to the plaintiff, and gave her 700*l.* portion. After that he makes a codicil, and gives 100*l.* a-piece to his unmarried daughters, and thereby *ratifies and confirms his will*, and dies.

Satisfaction
of Portion by
Legacies.

The plaintiff preferred his bill for the legacy of 600*l.* given to his wife by the said will. It was held by the Master of the Rolls, that the portion given by the testator in his lifetime should be intended in satisfaction of the legacy. And *it was agreed to be the constant rule, that where a legacy is given to a child, who afterwards, upon marriage or otherwise, receives the like or a greater sum, it shall be intended in satisfaction of the legacy, unless the testator declares his intention to be otherwise.* And it was said, the words of *ratifying and confirming* do not alter the case, though they amount to a new publica-

(*l*) [*Hale v. Acton*, 21 Car. 2, 2 Cha. Ca. 35.]

(*m*) *Copley v. Copley*, 1 P. Wms. 147.

(*n*) *Rickman v. Morgan*, 1 Bro. C. C. 63, and 2 Bro. C. C. 394.

(*o*) *Warren v. Warren*, 1 Bro. C. C. 305.

(*p*) See *Hanbury v. Hanbury*, with the cases there cited, 2 Bro. C. C. 352 and 529, and Lord Thurlow's judgment in *Rickman v. Morgan*, ib. 394; *Jeacock v. Falkener*, 1 Bro. C. C. 295; *Barret v. Beckford*, 1 Ves. 519.

(*q*) *Hinchcliffe v. Hinchcliffe*, 3 Ves. 516, (Lord Alvanley).

tion, being only words of form, and declare nothing of the testator's intent in this matter (r).

Satisfaction
of Portion by
Legacies.

But this rule does not apply to portions given by a stranger or distant relation, not *in loco parentis*, which shall not adeem a legacy given by his will. And the reason of the distinction is, that a parent is under a debt of nature to portion his child, and though he gives a legacy generally, he must be understood to mean it as a portion. If therefore he gives a sum of money afterwards upon a marriage, it is for the same end, and consequently an ademption of the legacy. But a stranger not being under this obligation, shall be taken to have meant a double bounty, unless the contrary appear by evidence(s). In *Hartop v. Whitmore* (t), the portion given by a father was less than the legacy, yet the latter was held to be adeemed (u).

A man seised in fee, devised to his children 1000*l.*, payable at several times, by 50*l.* a year, with which sums he charged his lands, and then died. One payment of 50*l.* became due; then the lands were aliened by *fine* and proclamations, and five years passed. The devisee sued for the whole. But it was decreed, that what became due after the *fine* was barred by the *fine*, but not the 50*l.* due before: for a trust is barred by *fine* (x).

Legacy given out of a *term for years*; if the term determines, the legacy is extinct (y).

Term of
Years.

A legacy of a *lease of tithes* is extinguished by a renewal of the lease, but a republication of the will after the renewal restores the legacy (z).

Lease of
Tithes.

A legacy was devised out of *debts* due in several counties, and they were all called in before the testator's death; yet the legacy remained good. And a difference was taken between a pecuniary and a specific legacy: for in the first case the legacy will remain, though the debt upon which it is charged be paid in; but the specific legacy may be lost by being altered. So where the legacy was greater than the debt out of which it was directed to be paid did amount unto, yet such sum being expressly devised, and there being assets, it was decreed to be paid (a).

Ademption
of specific
Legacies of
Debts.

(r) 2 Freem. 224; *Irod v. Hurst*, Trin., 1698; [S. P. by Lord Hardwicke in *Farnham v. Philips*, 2 Atk. 214.]

(s) *Shudal v. Jekyll*, 2 Atk. 516; *Powell v. Cleaver*, 2 Bro. 500.

(t) 1 P. Wms. 681.

(u) [See further, on the subject of satisfaction of portions by legacies, Roper on Legacies, vol. ii. c. 68, and V. Williams, vol. ii. 1029.] How far a legacy is a satisfaction for a debt, vide *supra*, "Of what Things;" [see Roper on Legacies, c. 17, vol. ii. 1025,

and V. Williams, vol. ii.] And when a distributary share shall be taken to be a performance of the intestate's covenant, vide *Lee v. d'Aranda*, 1 Ves. 1; *Blandy v. Widmore*, 2 Vern. 709; 1 P. Wms. 324.

(x) H., 30 & 31 Car. 2, *Wakelin v. Warner*, 2 Cha. Ca. 247.

(y) Cha. Ca. Finch, 464.

(z) 2 Ves. 418; vide *supra*, "Of what Things."

(a) [*Crommell v. Grumsden*,] Cha. Ca. Finch, 152; Raym. 335.

What does not amount to an Ademption of a specific Legacy of a Debt.

Ford v. Fleming, T., 1728 (b). One by will devised thus: "I give to my grand-daughter Mary Ford (the plaintiff) the sum of 40*l.*, being part of a debt due and owing to me for rent from G. M., she allowing what charges shall be expended in getting the same; also, I give unto my two grandsons the rest and residue of what is owing to me from the said G. M., which is about 40*l.* more, to be equally divided between them, they allowing charges as aforesaid." Afterwards, the testator received the whole debt owing for rent from G. M. For the plaintiff it was insisted, that there was a difference between a specific and a pecuniary legacy, that though the disposing of a specific might be an ademption of it, yet this being a pecuniary legacy, the paying the money to the testator would be a loss of it. On the other side it was insisted, that there is a difference between a voluntary and a compulsory payment; that though the first was no ademption, yet the second was; and that the testator compelled G. M. to pay in the money. But the Lord Chancellor was of opinion, that there was no foundation for the difference taken in the books between a voluntary and compulsory payment: for the latter might be with an intent to secure the legacy at all events; and decreed to the plaintiff the 40*l.* legacy.

So in the case of *Ashton v. Ashton*, M., 1735 (c), where the testator deviseth a debt, and afterwards receives it, or otherwise calls it in: In neither of these cases is this an ademption of the legacy; seeing this might be done from an apprehension of such debt being in danger, and with a design to secure it; and being personal estate, and not diminished by remaining in the testator's coffer instead of the hands of the debtor, it may well pass by the will.

[The true rule is laid down in *Humphrey v. Humphrey* (d) by Lord Thurlow. He says, "The only rule to be adhered to is to see whether the subject of the specific bequest remained in *specie* at the time of the testator's death; for if it did not, then there must be an end of the bequest; and the idea of discussing what were the particular motives and intention of the testator in each case in destroying the subject of the bequest would be productive of endless uncertainty and confusion." And this doctrine seems to be firmly established at the present day (e).—ED.]

Mere Possession by Testator at the Date of his Will of Stock,

M., 1736, *Partridge v. Partridge* (f). The testator devised to the legatee 1000*l.* capital South Sea stock. At the time of making his will he had 1800*l.* of such stock; and after by sale

(b) 1 Abr. Cas. Eq. 302.

(c) 3 P. Wms. 386, (Lord Talbot);
S. P. *Attorney-General v. Parkin*,
Amb. 596; *Bronsdon v. Winter*, *ibid.*
57. *Vide tamen Badrick v. Stevens*,
3 Bro. 431.

(d) [2 Cox, 185.]

(e) [*Barber v. Rayner*, 5 Madd.
208, 217; S. C. 2 Russ. Cha. Ca.
122.]

(f) Cas. Talb. 226.

reduced it to 200*l.*, which he after increased to 1600*l.*, and died. Between the making his will and his death, the act took place, which changed three-fourths of the capital South Sea stock into annuities. This legacy is not taken away or impaired by the sale, or by the act of parliament.

&c. of an equal or larger Amount than the Legacy, will not make the Bequest specific where given generally of Stocks, &c.

S. P. Bronsdon v. Winter (g). Where the testator bequeathed 2000*l.* capital stock in the South Sea Company; at the time of making his will, he had just 2000*l.* in that stock, but afterwards sold it, and Verney, M. R., held, that this was not a specific legacy, nor adeemed, but decreed the executor to make good the 2000*l.* stock out of the testator's personal estate (h).

The legatary or devisee may not of his own head take the goods or chattels devised to him out of the possession of the executor, because the law gives him a remedy for the same, and because the law doth not appoint that the legacies shall be paid until the debts of the testator be first satisfied (i).

Legacy where to be sued for.

For if the executor do detain the legacy, or do slack the performance of the testator's will, the legatary must sue the executor in the ecclesiastical court for the same legacy so detained or not satisfied (k).

in Ecclesiastical Courts,

For where a devise is made of goods, if the executor will not deliver them to the devisee, he hath no remedy by the common law (l).

For an action on the case lieth not against an executor for a legacy, unless he promise to pay it upon good consideration; for legacies are only to be recovered in the spiritual court, or in the courts of equity (m).

The jurisdiction of the Court of Chancery in suits for legacies is but of modern date compared with that of the ecclesiastical courts, being said to have commenced in the time of Lord C. Nottingham; but when aided by a *discovery* and *account*, it is more effective, and therefore more generally resorted to. The court also considers the executor as a trustee for the legatee, and will compel him (if he appears to have wasted the estate or to be in insolvent circumstances) to give security for the legacy if payable at a future day, or to bring the money into court (n). And as it is a rule that he who seeks must do equity, if a husband and wife sue for the personal legacy left to the wife, the court will not compel the payment of it till a proper settlement be made on her (o). The court will also see money put out for children; which excellent provisions could be but

or in Court of Chancery;

but not in a Court of Common Law.

(g) Amb. 57.

(l) Terms of the Law, Devise.

(h) [See also Roper on Legacies, (on the ademption of specific legacies), vol. i. 286; V. Williams, vol. ii. 1040.]

(m) 1 Sid. 46; Vin. Actions (O.), c. 7.

(n) 1 Cha. Ca. 121; 3 Bro. 365; *infra*.

(i) Swin. 19; 2 Bac. Abr. 435.

(o) *Brown v. Elton*, 3 P. Wms. 202.

(k) Swin. 18.

imperfectly obtained in the ecclesiastical court, and with still greater difficulty in an action for a legacy at common law, in which the legatee, if he recovered at all, must recover without any terms. These reasons induced the Court of King's Bench in a late case, to decide that an action for a legacy does not lie at common law (*p*). But such action will lie if the executor, having assets in his hand, assent to the legacy, for the moral obligation which he is under to pay the legacy provided he has assets, is a sufficient consideration for his undertaking to pay it (*q*). Such promise must however be in writing, by 29 Car. 2, c. 3, s. 4. But in *Cambden v. Turner*, C. B., sittings after Trin., 5 Geo. 1, King, C. J., held that an action for money had and received lay against an executor for a legacy which he had owned *lay ready for the plaintiff whenever he would call for it* (*r*). And in *Williams v. Lee* (*s*), the Court of Chancery held, that after an executor has assented, a legatee of a specific legacy may recover it in an action of trover. [Nevertheless the better opinion seems to be that it is an unqualified proposition, that an action at law cannot be maintained for a legacy (*t*), or for a distributive share of a testator's property, even where there has been an express promise to pay (*u*).—ED.] But an action at law lies against an executor to recover a *specific* chattel bequeathed, after his assent to the bequest (*x*).

In Ecclesiastical Court.

And in case of suit in the spiritual court, it behoveth the devisee to have a citation against the executor of the testament to appear before the ordinary, to show why he performs not the will of the testator (*y*).

And although certain goods in specie are given to a man by will, yet he cannot take them without the executor's assent; so if a term for years be so given to him, he cannot enter into the land without such assent; for it may be the executor hath not assets besides to pay the testator's debts (*z*).

Yea, if a man do bequeath goods to another, which are in the custody of that other person, yet if he detain them from the executor (who hath not assented to the legacy) the executor may have an action of detinue or trespass, or of trover after demand of the goods, against the said legatee (*a*).

But in case of a devise of *lands*, the devisee may enter without the assent of the executor; and if the heir at law

(*p*) *Deeks et Ux. v. Strutt*, 5 T. R. 544, (Littledale).]

690. (*u*) [Ibid.; *Johnson v. Johnson*, 3

(*q*) *Atkyns et Ux. v. Hill*, and Bos. & Pull. 169, (Lord Alvanley).]

Hawkes et Ux. v. Saunders, Cowp. 284—294; *Pearson v. Henry*, 5 T. R. 6. (*x*) [*Doe v. Guy*, 3 East's R. 120; *Paramour v. Yardley*, Plowd. 539; *Barton's case*, 1 Freem. 289; *Young*

(*r*) Cited by Buller, J., in *Hawkes v. Holmes*, 1 Stra. 70.]

v. Saunders, ubi supra.

(*s*) 3 Atk. 223.

(*t*) [*Jones v. Tanner*, 7 B. & C.

(*y*) Terms of the Law, Devise.

(*z*) Law of Ex. 262.

(*a*) Ibid. 263.

should enter before him, the devisee may enter and eject him (b).

For seeing that an inheritance devised is not demandable in the ecclesiastical court, but in the temporal, therefore the legatary, according to the devise, without farther assignment or delivery, may enter into the same after the death of the testator (c).

But if *chattels real*, as a lease, be bequeathed by will, a man may sue for the same in the court ecclesiastical (d).

If a legacy be granted *out of lands* in fee simple, this shall not be sued for in the spiritual court; but if land be devised to be *sold for payment of legacies*, the land being sold, the suit for the money to be distributed may be in the spiritual court; for the money is personal, and assets in the hands of the executors, so as it savours not of the realty being executed (e).

Legacy out
of Lands.

But where a man deviseth that his executors shall sell his lands, and out of the money which shall be raised by sale giveth a *portion to his daughters*, it hath been adjudged that neither the land nor money is testamentary, for it is not assets to satisfy debts, but a sum arising of land, and appointed to special uses in way of equity, and not as a legacy, and therefore not to be sued for in the ecclesiastical court, but in a court of equity; and the ecclesiastical court cannot hold plea of a legacy in equity, but where it is a legacy in law indeed (f).

[The jurisdiction (g) in *personal* legacies is exercised by the Court of Arches in cases of all wills proved in the Prerogative Court, and by the official principals of each diocese in cases of wills proved in the diocesan courts. For the mode of proceeding, see title *Arches*, vol. i., and *Practice*, vol. iii. of this work. But it has been said that the jurisdiction of the ecclesiastical court extends only to legacies of *personalty*, lands devised to be sold for the payment of legacies. Legacies which in any way arise out of the freehold must be sued for in a court of equity (h).—ED.]

Jurisdiction
of the Court
of Arches.

So if a man devise lands to be sold for the payment of debts, and dispose of the *surplus* to several persons, that cannot be sued for in an ecclesiastical court, but only in a court of equity, because that is not a legacy merely of goods and chattels, but it ariseth originally out of lands and tenements; and they have a testamentary jurisdiction touching chattels only (i).

So where the testator devised a legacy to one, to be paid

(b) 1 Inst. 11.

(c) Swin. 19.

(d) Ibid.

(e) [The case of *Netter v. Percival Brett*,] Cro. Car. 396, 397; Brownl. 32.

(f) Cro. Car. 395, 396; Swin. a. 19.

(g) [2 Roper on Legacies (White's edition), 691, and the cases there cited; *Reynish v. Martin*, 3 Atk. 333; *Capel v. Robarts and Neeld*, 3 Hagg. 164, note.—ED.]

(h) [*Barker v. May*, 9 B. & C. 489.]

(i) Str. 672.

Legacy out
of Lands.

out of the *profits* of his lands, and he deviseth those very lands to his executor for a term of years, and died, adjudged that this was a temporal matter, and not testamentary, because the legacy was to arise out of the profits of the lands (*k*).

But where the testator devised *leases* to his eldest son, and that out of the same he should raise such a sum of money for portions for his daughters, who libelled in the spiritual court for their portions, it was adjudged that this should not be accounted as a rent issuing out of the lands, but as a testamentary legacy, and to be recovered in that court (*l*).

[Interests *less than freehold*, arising out of real property, such bequests of terms for years or of rents payable out of them, may be sued for in the ecclesiastical court (*m*).

[A legatee is not bound to call for an inventory and account before he commences his suit in the ecclesiastical court, in order to see whether there be assets. And where the executor admits the legacy, but pleads *plene administravit*, and exhibits an inventory and account, the legatee, proceeding no further, will be dismissed without costs (*n*). Sometimes, however, as a preliminary proceeding, an inventory and account is called for in the Prerogative Court (*o*).—ED.]

M., 2 Ann., *Ewer v. Jones*. It was held by Holt, Chief Justice, clearly, that a devisee may maintain an action at *common law* against a tertenant for a legacy devised out of land; for where a statute, as the statute of wills, gives a right, the party by consequence shall have an action at law to recover that right (*p*).

But the usual remedy in such like cases is in equity (*q*).

Where Eccle-
siastical and
Equity Courts
have a con-
current Juris-
diction.

It is said that where the ecclesiastical court and a court of equity have a concurrent jurisdiction, whichever is first possessed of the cause has a right to proceed; and the same of all other courts. But where the husband hath sued in the spiritual court for a legacy given to the wife, the Court of Chancery hath granted an injunction to stay proceedings, because the spiritual court cannot oblige him to make an adequate settlement on her (*r*).

So where a personal legacy was given to an infant, it was held that the same is more properly cognizable in Chancery than in the ecclesiastical court; and if the matter had proceeded to sentence in the ecclesiastical court, yet it was proper to come into Chancery for the executor's indemnity; for in the Chancery legatees are to give security for the money, but

(*k*) Swin. 20.

(*l*) 2 Bulst. 153.

(*m*) [*Rumney v. Rosse*, 2 Keb. 8, pl. 22; *Love v. Naplesden*, Cro. Jac. 279.]

(*n*) [*Rumsey v. Tizard*, 1 Lee, 537.]

(*o*) [*Capel v. Robarts and Neeld*,

3 Hagg. 164, note.]

(*p*) 2 Salk. 415.

(*q*) 3 Salk. 223, tit. Legacy. [As to an action for a legacy charged on lands, see *Braithwaite v. Skinner*, 5 Mees. & W. 313.—ED.]

(*r*) [*Nicholson v. Nicholson*, Prec. Cha. 546.]

not in the spiritual court; and the Chancery will see the money put out for the children (s).

So where there is a trust, or any thing in nature of a trust, notwithstanding the ecclesiastical court hath an original jurisdiction in legacies, yet the Chancery will grant an injunction to stay the proceedings in the ecclesiastical court, trusts being properly cognizable only in equity (t).

Where there
is a Trust.

[But in *Grignion v. Grignion*, a sum of money being left to the executors in trust to invest and pay the interest to A. for life, and after A.'s death to divide the principal among his issue on their respectively attaining the age of twenty-one, with a benefit of survivorship till that age. A. being dead, his only three children majors, and the shares of two of them paid over, the court proceeded in a suit of subtraction of legacy against the executors to enforce payment of the third's share, holding that the character of trustee was at an end, and that of executor alone subsisting (u).—ED.]

So where a will is suppressed or destroyed, the suit for a personal legacy may be in equity in the first instance, without resorting to the spiritual court; otherwise it would put the plaintiff upon great difficulties; for in the spiritual court the plaintiff must prove it a will in writing, and must likewise prove the contents in the very words, and must also prove the whole will, though the remainder of it doth not at all belong to or regard his legacy, which the temporal courts do not put a person upon doing. Much more, when the legacy is charged both out of personal and real estate; for as to the real estate, there is no occasion to resort to the ecclesiastical court at all (x).

Legacies may be recovered in the spiritual court against an *administrator with the will annexed*, or against an *executor of his own wrong* (y).

[Where a legatee files a bill in Chancery, and also prays an inventory in the ecclesiastical court, the latter will compel him to elect in which court he will proceed, that the executor or administrator may not be unjustly harassed (z).—ED.]

Ecclesiasti-
cal Court.

Where the executor, being sued in the spiritual court for a legacy, pleads the legatee's release, and that court tries the validity of that release, the common law will not prohibit them, provided they try it by the rules of the common law, because they have jurisdiction of the legacy, which is the original cause (a).

But where *plene administravit* was pleaded in the spiritual

(s) [*Harrell v. Waldron*,] 1 Vern.
26.

(t) [*Anon.*, 1 Atk. 491.]

(u) [1 Hagg. 535.]

(x) 3 Atk. 361.

(y) [*Philpotts' case*, 1 Rolle's Abr.
919, (F) pl. 1.]

(z) [*Brotherton v. Hellyer*, 2 Lee,
134.]

(a) 2 Rolle's Abr. 307.

court, and proved by one witness, which they would not allow, a prohibition was granted (*b*).

So where an executor, being sued for a legacy in the spiritual court, pleaded the plaintiff's release, which was disallowed there, because the witnesses were dead, and that court refused to allow circumstantial proofs of the release, a prohibition was granted (*c*).

Security to
be given,
when the
Day of Pay-
ment is dis-
tant (*d*).

An executor may in some cases be compelled to give security to pay a legacy; as where 1000*l.* was devised to a person to be paid at the age of twenty-one years; and upon a bill exhibited against the executor, suggesting a *devastavit*, and praying that he might give security to pay the legacy when due, it was decreed accordingly (*e*).

The testator devised 800*l.* to an infant, to be paid by his executor when the said infant should attain to the age of twenty-one years. The infant by his guardian exhibited a bill, that the executor might give security for the payment of the money. And so it was decreed (*f*).

The testator bequeathed his personal estate to his wife for life, and what she should leave at her death to be equally distributed between his own kindred and hers: if the estate be so small that she cannot live upon it without spending the stock, it seems she shall not be obliged to give security; otherwise she shall (*g*).

Prowe's case, H., 11 Jac. 1 (*h*). If a person possessed of a lease for years, devise that his executor out of the profits thereof shall pay to every one of his daughters 20*l.* at their full age, the executor may be sued in the spiritual court to put in surety to pay the legacies, and no prohibition shall be granted; for this is to issue out of a chattel.

But in the case of *Palmer v. Mason*, M., 1737 (*i*), where 500*l.* was given to the grand-daughter, to be paid at twenty-one or marriage; and if she died before either of those contingencies happened, then to go over to another; it was said by Lord Hardwicke, as the legacy was devised over, nothing vested in the grand-daughter till one of the contingencies should happen; and therefore she was not entitled to have the legacy secured.

Modern Prac-
tice of Ap-
propriation
of Fund.

But per Lord Thurlow, C., in *Green v. Pigott* (*k*): The latter cases have been, that the fund should be appropriated; and whether a legacy be payable at a fixed or a contingent future day, the effect is the same; and his Lordship approved

(*b*) Het. 87.

(*c*) 2 Rolle's Abr. 302.

(*d*) [As to security exacted from bankrupt executor, *vide supra*, p. 156.—ED.]

(*e*) 1 Cha. Ca. 121.

(*f*) Swin. a. 40; Law of Ex. 187.

(*g*) Prec. Cha. 71.

(*h*) 2 Rolle's Abr. 285.

(*i*) 1 Atk. 505. [See Lord Hardwicke's remarks in *Johnson v. Mills*, 1 Ves. sen. 282.—ED.]

(*k*) 1 Bro. 103.

of the decree of the Master of the Rolls, ordering the legacy to be laid out in the purchase of Bank 3 per cent. consolidated annuities in the name of the accountant general, upon the trusts and subject to the contingencies of the testator's will.

[Mr. Roper in the 3rd section of his 14th chapter on the appropriation of legacies of money or stock, observes (l), "Although legatees are not entitled to receive the principal of their legacies before the time of payment arrives, yet where the legacies are not charged upon real estate (m), they are entitled to have them either appropriated or secured, according to circumstances.

["Little is to be met with in the books upon the subject of the present section, and the practice of the Court of Chancery respecting it has not been uniform. But the cases, after stated and referred to, seem to authorize the following conclusions:

["First, where a legatee has a *vested* legacy of sterling money or of stock, whether he is immediately entitled to receive the *whole* or only a *portion* of the interest or annual produce, until the time of payment of the principal arrives, he is entitled to apply to the Court of Chancery, to have the legacy separated from the bulk of the testator's personal estate, and appropriated by investment in the three per cent. consols for his benefit, until the payment of the principal (n).

["Secondly, the same rule obtains, where the legatee takes only a vested life or other less estate in the produce of a legacy of money or of stock (o).

["So also thirdly, where the legatee is entitled to a vested legacy of money or stock, subject to the life interest of another person (p).

["Fourthly, where a legacy in *sterling money* is given on a contingent event, and not any interest payable in the mean time, there the legatee cannot have the legacy separated from the bulk of the testator's estate, and, strictly speaking, *appropriated*, because it cannot be ascertained what sum of stock will, at the time of payment, produce the exact amount of the legacy in sterling money; and in such cases it is the practice of the Court of Chancery to order the fund to be paid to the person entitled to the residue, he giving *real security* to the legatee for the payment, when the contingency happens (q).

["Fifthly, the same rule seems to apply, for the same rea-

For Payment of Legacy.

Rules respecting Appropriation. First.

Second.

Third.

Fourth.

Fifth.

(l) [Roper on Legacies, vol. i. p. 793; see also V. Wms. on Ex. and Adm. vol. ii. p. 1106.]

(m) [Gawler v. Standerwick, 2 Cox, Ch. Car. 15; Roper on Legacies, vol. i. p. 558.]

(n) [Green v. Pigot, 1 Bro. C. C. 103; Roper on Legacies, vol. i. p. 795; Carey v. Askew, 2 Bro. C. C. 59; Roper on Legacies, vol. i. p. 796.]

(o) [Ibid., and see Webber v. Webber, 1 Sim. & Stu. 311.]

(p) [Pullen v. Smith, 5 Ves. 21; Roper on Legacies, vol. i. p. 797; Holland v. Hughes, 3 Mer. 685; Roper on Legacies, vol. i. p. 798; Houghton v. Franklin, 1 Sim. & Stu. 390.]

(q) [Webber v. Webber, ubi supra.]

son, to a legacy of *sterling money vested*, but not payable until a *future* day, and not any interest payable in the meantime; as where a legacy is given to A. ten years after testatrix's death, as in the case of *Ferrand v. Prentice* (r). But where *security* cannot be given, or is refused, the only alternative seems to be to have the money paid into the Bank, or, in other words, invested in the three per cents (s).

Sixth.

[“ But, sixthly, where a contingent or future legacy is given, *not in sterling* money, but in *stock*, and although not any interest is payable in the meantime, there, it should seem, the rule is otherwise, and an appropriation will be directed; because the reason against appropriation, before stated in respect of a legacy of sterling money, does not apply, since the actual *amount* of the stock does not vary, though its market *value* be subject to fluctuation.”—ED.]

Payment to
an Infant.

Mr. Wentworth says (t), in case an infant be of the age of discretion, to wit, fourteen years, he holdeth it clear that the payment of a legacy to him made will stand good, whether he who makes such payment have any acquittance or not, for if he have proof of the payment, he is well enough acquitted from any second payment.

And he thinks on demand and acquittance tendered, he ought to pay it to an infant of tender years in presence of his guardian; payment according to the testator's appointment being the matter which acquitteth the payer (u).

And Mr. Clerke says, if a legacy be left to an infant under seven years of age, the father, or next of kin, shall apply to the judge before whom he intends to sue for the legacy, and allege that such a person deceased made his will, and appointed such an one executor, and in the said will bequeathed unto his son, being an infant under seven years of age, such a legacy, and that by reason of such age, the said infant hath not a person able and fit to sue for the same, and shall implore the office of the judge in that behalf, and request that curators be assigned to the infant to sue for and recover the said legacy from the executor; whereupon the judge usually assigned such father or next of kin to be curators in that behalf (x).

But if the minor is above seven years of age, the judge doth not, *ex officio*, constitute a curator, but the minor is to choose one, either personally, or by commission, (as in case where he lives at a great distance, or otherwise), or sometimes by special proxy under his hand and seal, requesting that such curator may be assigned by the judge as aforesaid (y).

And if the executor, on suit of the minor by such curator as aforesaid, pay to the curator the legacy due to the minor, he

(r) [Amb. 273.]

(s) [*Ferrand v. Prentice*, stated in *Green v. Pigot*, 1 Bro. C. C. 105.]

(t) Went. 219.

(u) Went. 220, 221.

(x) 1 Ought. 357.

(y) Ibid. 358—360.

is discharged from any further payment thereof to the minor when he comes of age, although the curator never pay it to the minor, or shall become insolvent; and the reason is, because he pays it by the decree of the judge. And therefore it is advisable for the executor not to pay the legacy until suit hath been commenced against him by the curator, and he the said executor hath been cited; and then let him offer to pay the legacy *judicially*, that is, according to the forms of the court, and the same being entered in the acts of the judge, the executor is discharged (z).

Payment to
an Infant.

And in this case the judge is not wont, nor is obliged, to deliver the legacy to the curator for the use of the minor, until he hath given caution for the indemnity of the judge and of the executor in this behalf, and for the payment thereof to the minor when he shall come of age (a).

In the Court of Chancery, in the case of *Bullen v. Allen* (b), T., 28 Car. 2. An infant exhibited a bill by his guardian, for a legacy of 100*l.* devised to him; the defendant by his answer confessed the legacy, and that he was always ready to pay it, so as he might be lawfully discharged, which the plaintiff by reason of his infancy could not do; and therefore insisted that it might be paid without interest. Which was decreed accordingly, and the defendant to be indemnified.

And in the case of *Dyke v. Dyke* (c), H., 25 Car. 2. Where legacies were devised to infants payable at a certain time, which expired during their infancy, and the executor refused to pay the same because the legatees could not give any discharges by reason of their infancy, it was decreed, that the master should put out the money at interest in the name of the guardian, or of such other person as he should think fit, and that the defendant should be indemnified against the infants.

In the case of *Holloway v. Collins* (d), H., 26 & 27 Car. 2. A legacy of 125*l.* was given to the plaintiff, being but ten years old, and at that age was paid to the plaintiff's *father* who died insolvent. This was held by the lord keeper to be good payment; but the attorney-general urged very much the ill consequence of this, for the law must be the same if it were 1000*l.* and extends to other cases of like nature, not to legacies only; and said, that the executor ought to have sued in this court to have paid it. And the lord keeper said, it may be so where the legacy will bear the charge of suit, but not otherwise. But the executor having taken a bond to save him harmless, it was decreed that he should pay it over again, for he had paid it at his own peril.

But in the case of *Strickland v. Hudson* (e), E., 7 Anne, Lord Chancellor Cowper said, that the Master of the Rolls,

(z) 1 Ought. 362, 363.

(a) Ibid. 363.

(b) Cha. Ca. Finch. 264.

(c) Cha. Ca. Finch. 95.

(d) 1 Cha. Ca. 245.

(e) Ibid. 168.

Payment to
an Infant.

who had longer experience than himself, would never allow a child's legacy to be paid to the father or mother upon any security whatever, by reason of the strife it might occasion in a family.

And in the case of *Dagley v. Tollferry* (*f*), M., 1715, a legacy of 100*l.* was devised to an infant of about ten years of age; the executor paid this legacy to the father, and took his receipt for it. When the infant came of age, his father told him he had received the legacy, but could not pay it him immediately, and said he would not have him trouble the executor, for he would give it him. The son rested satisfied with this for about fourteen or fifteen years, and his father and he having carried on a joint trade together, became bankrupts. This legacy of 100*l.* being amongst other things assigned by the commissioners for the benefit of the creditors, the assignee brought a bill against the executor for an account and payment of this legacy. The defendant insisted on the extreme hardship of his case if he should be obliged to pay the legacy over again, that he had justly paid it to the father whilst he was in good circumstances, and that if application had been made sooner he might have had his remedy over against the father, that the father was by nature guardian to his child, and that formerly payment to him was allowed to be good. The Lord Chancellor said, that if the father had not made the son such promise of recompence, and the son had acquiesced all that time, the case might have been more doubtful; but this promise of the father drew him to forbear applying to the executor sooner, and since the father had not and could not now make good his promise, being a bankrupt, the reason of the son's forbearance was at end; he thought the rule of this court in not suffering parents to receive their children's legacies was founded on very good reason, and therefore lest hereafter this case should be cited as a precedent, when the circumstances attending it might be forgot, and to discountenance and deter others from paying such legacies to the parents (though he did not deny the hardship of that particular case), he decreed for the plaintiff against the executor.

[It may now be considered as a general rule, since the case of *Dagley v. Tollferry*, cited above, that where a legacy is left to an infant the executor cannot with safety pay it to the child or to another for his benefit, at least so is the opinion of Mr. Roper (*g*).

[The propriety of admitting parol evidence in this case was questioned by Lord Alvanley in *Cooper v. Thornton* (*h*).—ED.]

Phillips v. Paget (*i*), Nov. 11, 1740. Mrs. Paget by her will gives a legacy of 100*l.* to each of the three children of

(*f*) 1 Abr. Cas. Eq. 300; 3 Bac. Abr. 484.

(*g*) [White's edit. vol. i. p. 764.]

(*h*) [3 Bro. C. C. 97.]

(*i*) 2 Atk. 80.

Mr. Phillips, and makes the defendant her executor, leaving him the bulk of her estate, provided he pays the three legacies of 100*l.* within a year after her death, pursuant to her will. The defendant, within the time, pays to the children's own hands, their legacies. The eldest of them was sixteen years old at the time, the next fourteen, and the youngest nine only. And in his answer he denies that he knows this money ever came to the father's hands. But the children have now brought their bill against the defendant, to be paid their several legacies, suggesting that their father had embezzled the money paid by the defendant during their infancy, and is insolvent; and that this was a fraudulent payment to the father, and therefore it must be paid over again. Lord Hardwicke asked the counsel for the defendant if they knew any instance where an executor paying so large a sum as 100*l.* into the hands of minors, had been allowed such payments; indeed, in cases where the legacies have been very small, the payment has been allowed by the court. But in this case, notwithstanding the sum is above 100*l.* yet as the payment by the executors to the children themselves is so fully proved, and not at all controverted by the plaintiffs, and their losing the benefit of it is owing to the negligence and insolvency of the father, I will not strain the rules of this court to make the executor pay it over again, especially as he made this payment to save a forfeiture, it being an express condition of his own taking under the will that he should discharge their legacies within a year after Mrs. Paget's death. But the next day the Lord Chancellor said, that upon looking into the cases, he found this a very doubtful point, and unless the defendant will agree to give the plaintiffs something, he would not determine it without taking time to consider it. The defendant, upon this recommendation of the court, agreed to pay in 50*l.* to be divided between the three plaintiffs, and each side were to abide by their costs, and it was made part of the decree that the 50*l.* was paid by consent of all parties. And his lordship directed each of the plaintiffs, upon receiving their respective shares, to release their legacies under the will. The case of *Dagley v. Tollferry*, he said, must have had some other circumstances, for the rule is laid down too strictly, that in all cases where executors pay infants' legacies to their fathers, in order to deter executors from such payments, it shall be paid over again. Lord Cowper confirmed the decree of the Master of the Rolls in that case, but he seemeth to have had a remorse of judgment at the time; for in the register's office it appears his lordship ordered the deposit to be divided between the parties.

Payment to
an Infant.

And in the case of *Rotheram v. Fanshaw*, March 25, 1748 (*k*), Lord Hardwicke said, *arguendo*, that where a suit is instituted in the spiritual court, for an infant's legacy, by a

(*k*) 3 Atk. 629.

father, to have it paid into his hands, the court will grant an injunction; because it will not allow the infant's money to come into the father's hands.

If by Infancy
or Absence
Legacies can-
not be paid,
the Money
may be paid
into the Bank,
and laid out
in the 3l. *per*
Cents.

[Such being the rule of law respecting the invalidity of payments made to infant's executors, who were desirous of being discharged from their office, procured bills to be filed against them by the legatees, in order to dispose of those particular legacies under the direction and indemnity of a court of equity. To remedy this inconvenience, it was enacted by 36 Geo. 3, c. 52, s. 32, "That where, by reason of the infancy, or absence beyond the seas, of any person entitled to any legacy, or to the residue of any personal estate, or any part thereof, chargeable with duty by virtue of this act, the person or persons having or taking the burthen of any will or testamentary instrument, or the administration of such personal estate, cannot pay such legacy or some part thereof, although he, she, or they may have effects for that purpose, or cannot pay such residue or some part thereof, although he, she, or they may have the same, or some part thereof, in his, her, or their hands, it shall be lawful for such person or persons to pay such legacy, or residue, or any parts or part thereof respectively, or any sum or sums of money on account thereof, after deducting the duty chargeable thereon, into the Bank of England, with the privity of the accountant general of the Court of Chancery, to be placed to the account of the person or persons for whose benefit the same shall be so paid; for payment of which money the said accountant general shall give his certificate as usual in such cases, on production of the certificate of the commissioners of stamps, that the duty thereon has been duly paid; and such payment into the Bank shall be a sufficient discharge for the money so paid in, provided the duty be also paid thereon as aforesaid; and such money when paid in shall be laid out by the said accountant general, without any formal request for that purpose, in the purchase of three pounds *per centum* consolidated annuities, which, with the dividends thereon, shall be transferred and paid to the person or persons entitled thereto, or otherwise applied for his or their benefit, on application to the Court of Chancery, by petition or motion, in a summary way (*l*)."—ED.]

In what Case
a Legacy
shall bear
Interest, and
from Time.

By the civil law a testator cannot enjoin his executor to pay interest for the nonpayment of a legacy. And though interest or usury be only forbidden by the civil law beyond such a sum, yet it being entirely prohibited by the canon law, it follows, *à fortiori*, that he cannot do it by that law (*m*).

And by the laws of this realm, the receiving of interest for money was for a long time prohibited: but afterwards, from the unreasonableness of the thing itself, and the inconvenience thereof to society, these restrictions vanished by degrees, and

(*l*) [See on this statute, *Whopham v. Wingfield*, 4 Ves. 630.] (*m*) Ayl. Par. 342.

it became lawful to receive interest within certain bounds prescribed by the legislature; and as in other matters, so also in the case of legacies, the courts, both ecclesiastical and temporal, have allowed interest to be paid for legacies withheld in certain instances. And, generally, it is said, if a legacy be bequeathed to be paid divers years after the testator's death, this difference is to be observed; if the day were given in favour of the legatee being an infant, who could not safely receive it any sooner, then he shall have the profit; but if the respite was in favour of the executor, then the legatee shall have the bare legacy without interest (n).

Where the Legatee is an Infant, where not.

[The general rule is, that where a time of payment is named by testator, legacies will not carry interest before the arrival of that time.—ED.]

Butler v. Freeman, June 22, 1743 (o). The grandfather of the plaintiff, by will, after directing his debts and legacies to be paid, gives all the rest and residue of his personal estate to his grandson, the plaintiff, at his age of twenty-one, and if he die before that age, then to the defendant, Freeman, whom he makes his executor. The plaintiff brought his bill for the interest of the residue, to be paid to him during his infancy. The defendant, Freeman, by his answer insisted, that the plaintiff is not entitled to it, unless he attains his age of twenty-one, but that it ought to accumulate: and if the plaintiff dies before twenty-one, that it will equally belong to the defendant with the residue. The father of the plaintiff insisted, that the residue must be confined to what the testator left at the time of his death, and that the interest made after his death ought to be considered as an undisposed part, and go to him as next of kin to the testator, according to the statute of distribution: or if the court should be against him in this point, that then he is entitled to receive it for the maintenance of the plaintiff. By the Lord Chancellor Hardwicke: "I am of opinion, that the plaintiff is not entitled to the interest that arises from this residue; and though the words *rest and residue* must be confined to what shall be found at the death of the testator, after his debts, funeral expenses, and legacies are paid, yet that the interest ought to accumulate till the plaintiff arrives at his age of twenty-one, and as often as it amounts to a competent sum to be placed out by a trustee appointed by the master. I am not quite so clear how the interest would go, if the accident should happen of the plaintiff's dying before twenty-one, whether to the representative of the plaintiff, or to the defendant, Freeman: but that is not necessary to be inquired into at this time. As to the father's claim, I am of opinion he has no right to the interest, because the testator has given *all the rest and residue* of his personal estate, so that he cannot be said to have left any part undisposed, and con-

(n) Went. 352. [See the case of *Cases in Chancery*, 92.]
Bilson v. Sanders, Bunb. 240; Select (o) 3 Atk. 58.

It makes no difference if the Legacy be vested.

sequently can have no title to it as next of kin under the statute of distribution. *For as the devise of the residue is contingent, it not vesting till the grandson's age of twenty-one, the interest is so likewise, and must accumulate in the meantime;* nor can the father by the rules of this court entitle himself to it as maintenance for the infant, because it is given by a grandfather to a grandson upon a contingency of attaining his age of twenty-one; and as nothing is said how the produce of it shall be applied, he is not entitled as a grandson to be maintained out of the produce. The law of nature obliges only fathers to maintain their children; and *unless the child, from the mean circumstances of the parent, is in danger of perishing for want, the court will not direct the interest that shall be made of a contingent legacy to be applied for that purpose:* so that unless the parent is totally incapable, or under particular circumstances, as having a numerous family of children, and is bordering upon necessity, the law of the land and of nature make it incumbent on the parent to maintain his child. In the case of *Acherley v. Vernon* (p), where the testator, Mr. Vernon, had left 6000*l.* to the plaintiff, his niece, to be paid to her at her age of twenty-one, and she insisted that the interest of this money ought to be allowed for her maintenance; Lord Macclesfield was of opinion, that the interest in that cause ought to follow the principal, for it was a vested legacy, and payable at twenty-one. But there it was a sum of money separated and detached from the rest of the estate, and a vested legacy; here it is a contingent one, and not a specific sum, but of the residue of his personal estate, which makes a difference between the cases; and the father likewise in the present case possessed of a good estate, and in considerable circumstances." Therefore his lordship decreed the interest which has arisen upon the residue of the testator's personal estate since his death, or which may arise, to be paid into the hands of a trustee, to be laid out in real or government securities as often as it shall amount to a competent sum.

Heath v. Perry, July 2, 1744 (q). The testator by his will gave 1000*l.* a-piece to five brothers and sisters (but who were no relations to him), to be paid to them at their respective ages of twenty-one, in case they should respectively attain that age, and not otherwise; and if any of them should happen to die before they attain their respective ages of twenty-one, that then and in such case the legacy or legacies of 1000*l.* so given to them respectively shall be void. The legatees brought a bill for interest on their legacies. By Lord Hardwicke: Cases of this kind how far a legatee, who is not entitled to the payment of the legacy immediately, shall have interest in the meantime, depend upon particular circumstances. Some

(p) 1 P. Wms. 783.

(q) 3 Atk. 101.

upon relationship, some upon the necessities of legatees, and most of them upon the particular penning of wills; and there is hardly one case which can be cited that is a precedent for another. Some things are certain in these cases; for if a legacy is given generally at marriage, or at twenty-one, then the vesting and time of payment are the same, and shall not vest till marriage or twenty-one. To go one step further; where a legacy is actually vested, as if given to an infant payable at twenty-one, yet it shall not carry interest, unless something is said in the will that shows the testator's intention to give interest in the meantime. But *all these cases are subject to this exception, if it is in the case of a child; for then let a testator give it how he will, either at twenty-one, or at marriage, or payable at twenty-one, or payable at marriage, and the child has no other provision, the court will give interest by way of maintenance*, for they will not presume the father so unnatural as to leave a child destitute. But in the present case the legatees are mere strangers to the testator; and nothing shall be taken out of the estate for their benefit during their nonage.

A legacy payable at any given time whatsoever does not carry interest till that time, whether it is a vested interest or not: the time of payment must govern the commencement of interest, with this difference only, that a legacy given by a parent to a child shall carry interest from the death of the testator, on account of the obligation attaching on the person who gives it to provide a maintenance for his child(r). But there is no exception in favour of a *wife*, as for a *child*, to the rule, that a legacy does not bear interest before it is payable(s). But where legacies were devised payable out of money due on mortgage, *when the same should be recovered*, interest at the rate of 4*l.* was decreed from the death of the testator, and it was held not to depend on the time when the money was recovered(t).

[In these cases the time of payment is named by the testator; but] supposing interest to be due, another question arises, from what *time* the interest shall accrue. Concerning which, in the case of *Jolliffe v. Crew*, E., 1701(u), it was determined as follows: viz. If a legacy be devised generally, and no time ascertained for the payment, and the legatee be an infant, he shall be paid interest from the expiration of the first year after the testator's death; but it seems a year shall be allowed, for so long the statute of distribution allows before the distribution be compellable, and so long the executor shall have, that it may appear whether there be any debts. But if the legatee be of full age, he shall only have interest from the time of his demand after the year; for no time of payment being set, it is not payable but upon demand, and he shall not

If Interest be due, from what Time it shall accrue.

(r) [*Crickett v. Dolby*,] 3 Ves. 10;
[*Tyrrell v. Tyrrell*,] 4 Ves. 1.

(s) *Stent v. Robinson*, 12 Ves. 461.

(t) [*Wood v. Penoyre*,] 13 Ves. 325.

(u) 2 Salk. 415; Prec. Cha. 161.

have interest but from the time of his demand: otherwise it is in case of an infant, because no laches are imputed to him. But where a certain legacy is left payable at a day certain, it must be paid with interest from that day.

Points decided as to
1. Legacy on Land.

2. On Personality.

3. On a dry Reversion.

4. On Mortgage.

5. Legacy brought into Court.

And in the case of *Maxwell v. Wettenhall*, T., 1723 (u), the following points were resolved: 1, If one gives a legacy charged upon land, which yields rents and profits, and there is no time of payment mentioned in the will, the legacy shall carry interest from the testator's death, because the land yields profit from that time. 2. But if a legacy be given out of a personal estate, and no time of payment mentioned in the will, this legacy shall carry interest only from the end of the year after the death of the testator. 3. If a legacy be given, charged upon a dry reversion, here it shall carry interest only from a year after the death of the testator, a year being a convenient time for sale. 4. If a legacy be given out of a personal estate, consisting of mortgages carrying interest, or of stocks yielding profits half-yearly, it seems in this case the legacy shall carry interest from the death of the testator. 5. If a legacy be brought into court, and the legatee hath notice of it, so that it is his fault not to pray to have the money, or that the money should be put out, the legatee in such case shall lose the interest from the time the money was brought into court; but if the money was put out, the legatee shall have the interest which the money put out by the court did yield.

Quantum of Interest is generally 4l. per Cent.

As to the *quantum* of interest, the determinations have been various. In the case of *Guillam v. Holland*, October 14th, 1741 (x), Lord Hardwicke said, where a portion is charged upon land, and the will doth not mention interest, the court will not give any more than 4l. per cent., though the legal interest is 5l. per cent.: and this rule hath also been extended to the cases of legacies and portions charged upon personal estate.

In the case of *Inclendon v. Northcote*, March 2nd, 1746 (y), Lord Hardwicke said at first, as no more had been allowed for many years than 4l. per cent. interest to children for maintenance, he did not care to break through the rule: but afterwards, in consideration of the interest of money being altered lately, mortgages being then at 4½l. per cent., and several at 5l. per cent., he ordered the children should have 4½l. interest.

In *Bryant v. Speke*, December 6th, 1748 (z), Lord Hardwicke said, the general rule is that legacies out of real estate carry 1l. per cent. lower than legal interest; but if out of personal estate, because of the higher interest of money than land, it shall carry the legal interest, unless particular circumstances induce the court to vary therefrom; and this, he said,

(u) 2 P. Wms. 26.

(x) 2 Atk. 343.

(y) 3 Atk. 438.

(z) 1 Ves. 171.

was in conformity to the ecclesiastical court, which gives legal interest upon legacies out of personal estate.

In *Beckford v. Tobin*, November 4th, 1749 (a), it was said by the Lord Chancellor Hardwicke, that in general the court exercises as large a discretion as to the rate of interest upon legacies, where interest is not particularly given, as in any case, and that it is difficult to reduce it to a certain rule. The most general rule hath been, between interest of legacies charged on land and on personal estate; and where nothing more, the court has said that land never produces profit equal to the interest of money, and will follow the course of things, and give interest where charged on land, 1*l. per cent.* lower than the legal interest. So it was when the legal interest was at 6*l.*; but in general, where a legacy is out of personal estate, the court gives 5*l.*; and unless that is taken to be a sort of rule, there will be no distinction between them. Nevertheless in the present case, the fund out of which the interest was to arise, yielding no more than 4*l.*, the court allowed but 4*l. per cent.*

Sitwell v. Bernard (b). The general rule is, that legacies (where no interest is given by the will) shall carry interest at 4*l. per cent.* only from the end of a year after the death of the testator (except where it is given by way of maintenance), though the fund produces more.

Ferrers v. Ferrers, M., 1733 (c). The Countess Dowager of Ferrers was by settlement and will of her late husband Earl Robert, entitled to a jointure estate of 1000*l.* a year, but was kept out of possession by Earl Washington, the son of Earl Robert by a former venter, and now insisted upon the arrears and interest from the time of her husband's death, comparing it to the case of arrears of an annuity or rent-charge, which are decreed to be paid with interest. By Talbot, Lord Chancellor: "The arrears of an annuity or rent-charge are never decreed to be paid with interest but where the sum is certain and fixed: and also where there is either a clause of entry or *nomine pænæ*, or some penalty upon the grantor which he must undergo if the grantee sued at law, and which would oblige him to come into this court for relief, which the court will not grant but upon equal terms, and those can be no other but decreeing the grantor to pay the arrears, with interest for the time during which the payment was withheld; but interest for the rents and profits of an estate was never decreed yet, the same being entirely uncertain. And though it may be said that the lady is entitled to an estate of 1000*l.* a year, yet that is not sufficiently certain, being only a

Interest on
Annuities.

(a) 1 Ves. 308; [*Treves v. Townsend*, 1 Bro. C. C. 384, Lord Thurlow.] Roper on Legacies, vol. i. c. 20, s. xv. White's edit.]

(b) 6 Ves. 520 [Lord Eldon. See (c) Cas. Talb. 2; [2 Roper on Legacies, 308, White's edit.]

perception of the profits of an estate, which are not to be paid at any one certain time, but only as the tenants of the land bring them in, some at one time, some at another."

Maintenance
and Educa-
tion, how far
to be allowed.

Rennesey v. Parrot, M., 16 Car. 2 (d). A legacy was made payable at the age of twenty-one years. The legatee by his guardian brought a bill against the executor for maintenance, suggesting that he had none. The executor demurred, for that the plaintiff was under age, and the legacy was not payable till twenty-one, and therefore no cause of suit: but the demurrer was over-ruled.

Harvey v. Harvey, E. 1722 (e). The testator being seised of a real estate, and possessed of a personal estate, and having several children, deviseth all his real and personal estate to his eldest son, charging the same with 1000*l.* a piece to all his younger children, payable at their respective ages of twenty-one: but in the will no notice is taken of maintenance for the younger children in the mean time. The younger children bring their bill in order to recover interest or some maintenance during their infancy. Upon which the master of the rolls decreed that the younger children should recover maintenance. He observed, that these being vested legacies, and no devise over, it would be extremely hard that the children should starve, when entitled to so considerable legacies, for the sake of their executors or administrators, who in case of their deaths would have the said legacies. That in this case the court would do what in common presumption the father (if living) would and ought to have done, which was to provide necessaries for his children. That a court of equity would make hard shifts for the provision of children; as where younger children were left destitute, and the eldest an infant, equity would make such a liberal allowance to the guardian of the eldest, as that he might thereout be enabled to maintain all the children; and for the same reason the court would likewise take a latitude in this case, that since interest was pretty much in the breast of the court, though the will were silent with regard to that, yet it should be presumed that the father, who gave these legacies, intended they should carry interest if the estate would bear it; for every one must suppose it to have been the intention of the father that his children should not want bread during their infancy. That for this reason it had been held, that though a legacy were devised over in case of the legatee's dying before twenty-one, yet the infant legatee ought to have interest allowed him during his infancy, in order for his maintenance, with this difference only, that where the estate has appeared to be small, the court, in whose discretion it always lies to determine the quantum of interest, has ordered the lower interest.

(d) 1 Cha. Ca. 60.

(e) 2 P. Wms. 21. [See Roper on

Legacies, vol. ii. c. 20, s. iv. White's edit.]

And it seemeth that if one, not a parent, gives a legacy to an infant, payable at twenty-one, without any devise over, and the infant has nothing else to subsist on, the court will order part of this legacy, in order to provide bread for the infant, to be paid presently, allowing interest for the same to the person paying it, out of the remaining principal, though this is done very sparingly.

Maintenance and Education, how far to be allowed.

M., 1684, *Barlow v. Grant* (f). Upon a bill for 100*l.* legacy given to a child, the defendant insisted upon an allowance of 16*l.* a year for keeping the legatee at school. It was objected that only the bare interest of the money ought to have been expended in his education, and not to have sunk the principal, as in this case the defendant had done. But the Lord Keeper thought it fit and reasonable to be allowed; and said, the money laid out in the child's education was most advantageous and beneficial for the infant, and therefore he should make no scruple of breaking into the principal, where so small a sum was devised, that the interest thereof would not suffice to give the legatee a competent maintenance and education; but in case of a legacy of 1000*l.*, or the like, there it might be reasonable to restrain the maintenance to the interest of the money.

Where Court will allow the Principal to be broken into.

[The court is averse to breaking in upon the capital of a legacy for the mere purpose of maintenance, though it frequently does so for the purpose of putting out the child for life (g).—ED.]

But if the legacy is devised over, it seemeth to be otherwise; and that the court in such case will not diminish the principal, but only allow the interest thereof to the first legatee, until the time that the legacy shall become payable (h).

Where Legacy is devised over.

Also a legacy in the hands of the father given to his children by a relation or other, shall not be diminished by the father, because he is obliged to maintain his own children: As in the case of *Darley v. Darley*, December 6, 1746 (i). A bill was brought by the plaintiff for two legacies of 50*l.* each, left to himself and his sister under the will of their grandfather, and for the interest that has been made thereof. The sister's legacy he claims by assignment from her. The defendant, being executor to the father, insists he is not obliged to account to the plaintiff for principal or interest, 105*l.* being expended for putting him out apprentice, and much more than 50*l.* in the maintenance and clothing of the sister. By the Lord Chancellor Hardwicke: "Where legacies are given to a child by a relation, a father cannot make use of such legacy in maintenance of the child, but must provide for him out of his own pocket;

(f) 1 Vern. 255.

577.—ED.]

(g) [*Walker v. Wetherell*, 6 Ves. 474, (Sir W. Grant); *Ex parte Green*, 1 Jac. & Walk. 253; *Payne v. Low*, 1 Russ. & M. 223; *ibid.* 499, 575,

(h) *Leech v. Leech*, H., 26 & 27 Car. 2, 1 Cha. Ca.; *Brewin v. Brewin*, E., 1702, Prec. Cha. 195.

(i) 3 Atk. 399.

Maintenance.

nor can he set him out in the world, or put him out an apprentice or clerk with the money arising from the legacy; and if he does, he shall not be allowed it." And he ordered interest to be computed on the legacies given to the plaintiff and his sister from the time they respectively attained their ages of twenty-one, at five per cent., and that what shall be found due for principal and interest of these legacies be paid by the defendant to the plaintiff, he having admitted assets of the father for that purpose.

[Where one who is *not a parent* gives a legacy to an infant, and where the parents are unable to maintain him, the general rule is, if the bequest be vested and immediate (so that if the legatee were a major he would be paid his legacy after the lapse of a year), to order maintenance out of the interest of the legacy, although there not only be no provision for maintenance, but even a direction that the interest should accumulate^(k).—ED.]

Aynsworth v. Pratchett (l). In this case the testator devised his real and personal estate to trustees, upon trust to pay to his wife for her life such annual sum as would, with the rents and profits of his estate settled upon her, make up 100*l.* per annum, and for the maintenance of his children the further sum of 30*l.* per annum each so long as they should remain under her care. His daughter was entitled to 1000*l.* under the will, as her fortune at the age of twenty-one, and the residue was to be divided amongst his sons with survivorship. An increase of maintenance was ordered on the ground of the allowance under the will being insufficient.

[*Josselyn v. Josselyn* (m). A testator gave his residuary estate to an infant, and directed 60*l.* per annum to be allowed for his maintenance; the residue was of large amount, and the court from time to time increased the maintenance.—ED.]

Payment to a
Feme Covert.

Palmer v. Trevor, Nov. 4, 1684⁽ⁿ⁾. Morley devised 100*l.* to his daughter Elizabeth Palmer, a *feme covert*, and dies. The executor pays it to Elizabeth, who spends it in her own maintenance. Her husband sues for it; and the question was, whether this was a good payment to the wife, it being in proof that at the time of making the will Palmer and his wife lived apart, and the husband did not allow her maintenance, and so it is a strong presumption that the deviser intended this for her separate use. By the Lord Keeper: "If it had been so given in express terms, the payment to her had been good; but as it is, the husband must have it decreed." He said, that in case where a tenant paid his rent to his landlady, not knowing that she was married, yet the husband made him pay it over again, and no help for it. Moreover the will appointing the legacy

(k) [*Greenwell v. Greenwell*, 5 Ves. 194; *Collis v. Blackburn*, 9 Ves. 470; *Stretch v. Watkins*, 253; *vide ante*, p. 201.]

(l) 13 Ves. 321.

(m) [9 Sim. 63.]

(n) 1 Vern. 261.

to be paid within six months after the testator's decease, the Lord Keeper decreed the husband interest from that time, but if no time limited, no interest. Payment to a *Feme Covert.*

But if the husband sue for a personal legacy given to the wife, the court will not compel the payment of it till a proper settlement be made on her (o).

[It seems, however, that the court exercises a discretion, and never settles the whole upon her (p).—ED.]

A legacy to a married woman, subject of a foreign state, was decreed to be paid to the husband, to whom it would by the law of that country belong (q).

[If she be divorced *à mensû et thoro*, the legacy must be paid to the husband, who alone can release (r). If she be living in adultery, the court will only interfere to secure trust property for the benefit of the survivor or the children (s).

[Courts of equity have established the following distinction between *legatees* and their *representatives*, in relation to the time of paying the legacies, viz. that if a legacy be given to A., to be paid at twenty-one, and the intermediate interest is not given, and A. dies before that period, his representative must wait for the money until A. if living would have attained twenty-one; but if the legacy be limited over to B. in the event of A. dying under that age, and A. die before that time, B. will be entitled to call for it immediately on the death of A. The reasons are these: The representative of A. can claim no other-wise than A. could have done if living. As A. therefore had no power to call for his legacy before he attained twenty-one, neither can his representative insist upon payment of it sooner. But in the other case B., the legatee over, does not derive his title through A., but under the testator's will, by a distinct and substantive gift, upon the contingency of A. dying under twenty-one. So that whenever that event happens, the time of payment not being otherwise postponed, B. becomes immediately entitled to receive his legacy (t).—ED.]

Difference as to the Time of Payment of a Legacy to a Legatee and his Representative.

In the case of *Grove v. Benson*, M., 21 Car. 2 (u), it is said generally, that an executor is not bound to pay a legacy, without security to refund, in case there be a defect of assets.

Security to refund.

And in the case of *Noel v. Robinson*, M., 1682 (x), it is said that if they give sentence in the ecclesiastical court for the payment of a legacy, a prohibition will lie, unless they take security to refund in case of insufficiency of goods to discharge

(o) *Brown v. Elton*, 3 P.Wms. 202, 146; *Ball v. Montgomery*, 2 Ves. jun. cited *supra*; [*Lady Ellbanke v. Montolieu*, *ibid.*; 5 Ves. 742.] 191; 1 Rop. on Leg. (White's edit.) 773; V. Williams on Ex. & Ad. vol.

(p) [*Coster v. Coster*, 9 Sim. 597.] ii. p. 1119.]

(q) *Campbell v. French*, 3 Ves. 321. (t) [Rop. on Leg. (White's edit.)

(r) [*Chamberlain v. Hewson*, 1 Salk. vol. i. pp. 755, 756.]
115; *Green v. Otte*, 1 Sim. & Stu. 250.] (u) 1 Cha. Cas. 149.

(s) [*Carr v. Eastabroke*, 4 Ves. Ayl. Par. 343.] (x) 2 Ventr. 358; 3 Bac. Ab. 483;

debts, and the like; for a diminution of legacies is to be made *pro ratâ*, if the testator's estate will not extend to pay them all.

Exacted by
Ecclesiastical
Court.

And Mr. Oughton says (*y*), "If the testator hath given bond with any person for the payment of a debt after certain years to come, or for the performance of any covenants or contracts at a future day, although the executor in this case hath goods in his hands sufficient to pay the legacies, yet if the said sum for which the testator was bound is not paid, or the said covenants be not fulfilled, in such case the executor for his indemnity may offer judicially the legacy upon this condition, that the legatary first give proper security to keep him indemnified with respect to the debts and covenants aforesaid, at least proportionably, regard being had to the other legacies. Which if the legatary shall refuse, the executor may leave the same with the register upon the condition.

The form of which security to be given as aforesaid, may be this:—

"*Know all men by these presents, &c. [as in the common form of bonds]: Whereas E. F., late of —, deceased, did on the — day of — duly make and execute his last will and testament, and did therein, amongst other legacies, give and bequeath unto the above bounden A. B. the sum of —, and therein and thereof did name and appoint the above-named C. D. executor, who hath proved the same in the Consistory Court of —, and taken upon himself the execution thereof: And whereas the said C. D. hath at the request of the said A. B. actually paid to him the said A. B. the whole legacy of —, although there may be cause to apprehend a deficiency of assets for payment of the other legacies: The condition of this obligation is such, that if such deficiency shall actually and bonâ fide happen, the said A. B., his executors or administrators, shall within — days next after request in that behalf to him made, refund and pay back unto him the said C. D., his executor or executors, administrator or administrators, his or their rateable part or share of such deficiency, then this obligation to be void, otherwise of force.*"

[In a very recent case (1832) in the Prerogative Court of Canterbury, the learned judge observed, "I may go so far as to say that the executrix is bound to pay the legacy, upon condition that the legatee gives security to refund in case the amount of his legacy is required in discharge of debts (*z*)."*Vide post*, as to the practice of courts of equity. The principle of demanding such security is borrowed by both courts from the civil law.—ED.]

In Equity the
Presumption
is, that where
an Executor
pays *one*, he
has Funds to
pay *all* Le-
gacies,

And in a court of equity common justice will compel a legatee to refund, although no security hath been given for that purpose (*a*).

And by the Lord Chancellor Hardwicke, legatees are not

(*y*) 1 Ought. 369, 370.

(*a*) [Noel v. Robinson,] 1 Vern.

(*z*) [Higgins v. Higgins, 4 Hagg. 93, 94.
243.]

obliged to give security to refund upon a deficiency of assets (b).

And the rule is where an executor pays a legacy, the presumption is, that he hath sufficient to pay all legacies, and the court will oblige him, if solvent, to pay the rest, and not permit him to bring a bill to compel the legatee, whom he *voluntarily* paid, to refund, although, if the executor prove insolvent, so that there is no other way, the court will admit a bill by the other legatees to compel that legatee to refund (c).

[But it should seem that where the payment has been *compulsory* and not *voluntary*, or that when debts are claimed *subsequently*, of which the executors had no notice when they paid the legacies, that he may compel, by a bill, the legatee to refund (d).—ED.]

Exception to this Rule.

And in the case of *Davis v. Davis*, E., 4 Geo. 4 (e), on a bill by an executor against a legatee, to refund a legacy voluntarily paid him by the executor, the assets falling short to satisfy the testator's debts, it was decreed by Sir Joseph Jekyll, Master of the Rolls, that the defendant should refund to the plaintiff, and that an executor may bring a bill against a legatee to refund a legacy voluntarily paid him, as well as a creditor; for the executor, paying a debt of the testator out of his own pocket, stands in the place of the creditor, and has the same equity against a legatee to compel him to refund.

[If a bond of the testator be outstanding, with a condition which may be broken, or if he have entered into covenants which may render his estate liable to damages, in such and the like instances the executor may and ought to insist upon an ample indemnity before he pay the legacies or part of the residue (f).—ED.]

When in Equity a Legatee must give Security against contingent Debts.

The ancient law was, that if a man bequeath 20*l.* to one, and 20*l.* to another, and 20*l.* to a third, and makes his executor and dies, having goods but to the value of 20*l.* in all, of which goods the executor maketh an inventory: in this case he may pay which of the three he pleaseth his whole legacy, and the other two are without remedy: or he may if he please pay every one of them a rateable part; and in case the executor make no inventory, yet he is chargeable no further than the value of the goods; and so if every legatary in

If Assets fall short, in what Case *general* Legatees shall abate.

(b) [*Anon.*] 1 Atk. 491; 1 Ves. 205; *Nelthorpe v. Biscoe*, 1 Ch. Ca. 135. See Roper on Legacies, vol. i. c. vii. s. 3, p. 398, White's edition; *vide post.*—ED.]

(c) 2 Ves. 194. [See also *Coppin v. Coppin*, 2 P. Wms. 292—296; Lord King, *Orr v. Kaines*, 2 Ves. sen. 194; Sir John Strange, M. R., *Newman v. Barton*, 2 Vern. 205; *Keylinge's case*, 1 Eq. Ca. Abr. 239, pl. 25.—ED.]

(e) *Viner, Devise*, Q. d. 35.

(f) [*Simmons v. Bolland*, 3 Meriv. 547, Sir W. Grant, and the cases therein cited; *Vernon v. Egmont*, 1 Bligh's N. S. 554, Lord Lyndhurst, House of Lords.—ED.]

(d) [*Newman v. Barton*, 2 Vern.

If Assets fall
short, in what
Case *general*
Legatees shall
abate.

such case should sue him, they must prove sufficiency of goods, or otherwise they shall get nothing (*g*).

But Mr. Clark says (*h*) (agreeable to the rule in the courts of equity), "If after payment of the debts and funeral expenses there be not sufficient for all the legatees, there must be a proportionable distribution according to the quantity of each legacy."

And Dr. Swinburne says (*i*), "If the executor do make an inventory according to the laws and statutes of this realm, then he need not pay to any legatary his whole legacy, though he be first named in the will, in case there is not sufficient to answer unto every legatary his whole legacy, but may retain a rateable part or proportionable deduction from every legacy, saving in certain cases; whereof one is, when some special thing is bequeathed, as the testator's signet or his white horse; which special legacy (as some do deem) is to be satisfied and paid wholly without diminution in respect of any other general legacies, or of legacies which consist in quantity. Another case is, when the father doth bequeath something to his daughter for her dower, or towards her marriage. Another is, when the testator doth bequeath any thing in satisfaction or recompence for some injury by him done, or of goods evil gotten. For those legacies are not to be diminished by reason of other general legacies, or legacies consisting in quantity, which shall remain wholly unsatisfied, rather than those aforesaid legacies shall be diminished; and consequently in these cases it is not in the power of the executor to gratify any other legatary at his election."

And he says further, "that if the executor enter to the testator's goods, and will make no inventory thereof, then may every legatary recover his whole legacy at his hands; for in this case the law presumeth that there is sufficient goods to pay all the legacies, and that the executor doth secretly and fraudulently subtract the same; whereas otherwise the executor is presumed not to have any more goods which were the testator's than are described in the inventory, the same being lawfully made (*k*)."

But if the executor had at first enough to pay all the legacies, and afterwards by his wasting the assets occasions a deficiency, the legatee who has recovered his legacy shall have the advantage of his legal diligence, which the other legatees neglected by not bringing their suit in time (*l*).

And although a legatee shall refund against creditors if there be not sufficient assets to pay all the debts, and likewise against legatees, where all of them have not an equal share in regard of assets falling short, yet it hath been said that an executor

(*g*) Curs. 186.
(*h*) 1 Ought. 366.
(*i*) Swin. 227, 228.

(*k*) Swin. 228, 229.
(*l*) 1 P. Wms. 495.

himself shall never bring a legacy back when he hath once assented to it, unless he paid the debts of the testator by compulsion (*m*).

[The result of the cases decided in courts of equity seems to be, that they will *not* make a difference among *general* legatees, and exempt some of them from the operation of the rule of abatement, upon slight inferences or conjectures that the testator intended to give their legacies a priority of payment, when such intention can alone be inferred from the relation of the legatees to him, or from the purposes to which the bequests are applicable (*n*). But this must be understood only as among legatees who are all volunteers, for if there be any valuable consideration for the testamentary gift, as a debt owing to the legatee, the relinquishment of any right or interest, such as a widow's dower (*o*) (if the right or interest be subsisting at the time of the testator's death), such legacies, though *general*, are entitled to preference over other general legacies which are mere bounties (*p*).—ED.]

Result of the Cases as to the Abatement of general Legatees.

So where a *specific* legacy is devised, the legatee must have it entire, though there are not sufficient assets to pay the rest of the legacies: but if 100*l.* is devised to one, and several money legacies to others, and the testator directs that the legacy of 100*l.* shall be paid *in the first place*, yet if the other legacies fall short, the legatee of 100*l.* must make a proportionable abatement of this legacy (*r*).

Specific Legacy or Devise (*q*).

If one gives a specific legacy of a horse, diamond, or land, and also a pecuniary legacy, and there are not assets to pay both, the specific legatee shall be preferred and have his whole legacy; for were the executor to make him contribute towards the pecuniary legacy, this would be *pro tanto* to make such specific legatee buy his legacy, against the manifest intention of the testator (*s*). But if the question is between two or more specific devisees, they shall contribute equally on a deficiency of assets: thus one seised in fee of land, and possessed of a lease for years, devised the fee to A. and the lease to B., and died indebted by bond; on a deficiency of assets, both devisees were ordered to contribute to the payment of the bond, but

Why a specific Legatee shall not abate.

Between two specific Devisees.

(*m*) *Noel v. Robinson*, M., 1682, 1 Vern. 90; 2 Ventr. 358. [See Mr. V. Williams on Exors. and Ad. vol. ii. p. 1083, 3d edit.; Roper on Legacies, vol. i. p. 364, White's ed.; *vide sup.*]

(*n*) [*Vide post*; Roper on Legacies, vol. i. p. 364, White's edit.]

(*o*) [It is enacted by section 12 of 3 & 4 Will. 4, c. 105 (An Act for the Amendment of the Law of Dower), "That nothing in this act contained shall interfere with any rule of equity, or of any ecclesiastical court, by which legacies bequeathed to widows in sa-

tisfaction of dower, are entitled to priority over other legacies."]

(*p*) [Vaughan Williams on Exors. and Adm. vol. i. p. 1079, and cases there cited.]

(*q*) [As to the abatement of specific legacies, see Roper on Legacies, vol. i. p. 313, White's edit.; and Mr. Vaughan Williams on Exors. and Ad. vol. ii. p. 1083, 3rd edit.—ED.]

(*r*) *Brown v. Allen*, H., 1681, 1 Vern. 31.

(*s*) *Clifton v. Burt*, 1 P. Wms. 678.

Between a
specific De-
visee and
Heir.

Why Assets
are mar-
shalled.

Blower
v.
Morret.
What Words
do not con-
stitute a spe-
cific Legacy.

the simple contract debts to fall on the leasehold estate (*t*). But had the fee been mortgaged, A. would have taken it *cum onere* (*u*), unless the testator had added "after payment of all debts" (*x*); in which case the specific devisees of land incumbered and land unincumbered, shall contribute to discharge the mortgage. But where the question was not between two specific devisees, but a specific devisee of land incumbered by mortgage, and the heir taking by descent, Lord Hardwicke, C., after great consideration, decreed that the land devised should be exonerated out of the real assets descended (*y*). If lands be devised to pay debts, a legatee, whether specific or pecuniary, shall be paid out of the lands, if the simple contract creditors have exhausted the personalty (*z*). In order to give effect to these rules for the payment of legacies, the court either makes an equitable arrangement of the assets in the nature of marshalling them, that is, if there are two claimants, one of whom can resort to the real estate and the other cannot, directs the first to resort to that fund on which the second has no lien; or if the first receive satisfaction out of the personalty, allows the second to stand in his place *pro tanto* against the real estate. But the court does not primarily subject any fund to a claim to which it is not subject by the nature of the claim (*a*).

In the case of *Blower v. Morret*, July 10th, 1752 (*b*), lands were devised to trustees to be sold for payment of debts and legacies; the testator afterwards gives to his wife a general legacy of 500*l.* to be paid to her immediately after his decease out of the first money that should be got in after his death. It was insisted this 500*l.* legacy should not abate in proportion with others, from the particular directions attending it. By Lord Hardwicke: "Cases of this kind, of a claim by pecuniary legatees of a priority of satisfaction, so as not to abate in proportion with others, seldom come before the court, and there are fewer in which the court has given way to claims of that kind; there must be therefore very strong words to induce the court to give way to it; for in most cases the court has disclaimed the laying weight on particular words, as the saying *imprimis* or *in the first place*, or a direction for the time of payment; because if the court was upon such grounds to give a preference to one pecuniary legatee, there would be no end of it, considering the variety of expression and the

(*t*) [*Long v. Short*,] 1 P. Wms. 403.

(*u*) *Oneale v. Meade*, post.

(*x*) [*Carter v. Barnardiston*,] 1 P. Wms. 505.

(*y*) [*Galton v. Hancock*,] 2 Atk. 430.

(*z*) [*Haslewood v. Pope*,] 3 P. Wms. 322.

(*a*) See the cases cited by Mr. Coxe,

in his note to the case of *Clifton v. Burt*, 1 P. Wms. 679; and as to what is a sufficient description to render a legacy specific, see the cases collected by Mr. Fonblanque, in his note to Treat. of Eq. b. 4, p. 1, c. 2, s. 5; [and Roper on Legacies, vol. i. p. 167, White's edit.]

(*b*) 2 Ves. 420; [*vide supra*.]

incorrectness with which wills are frequently drawn : and I am of opinion that the direction to be paid to his wife immediately after his decease, is not sufficient to give her a preference ; for that only relates to the time of payment : he directs that whereas the general rule of law is, that legacies should not be paid until a year, this shall be paid immediately. The consequence is, that if it is not then paid, it should carry interest immediately, which is always considered as a compensation for delay of payment, and puts her in the same condition as if it was paid."

The inclination of the court is against specific legacies, and the rule is to determine on the face of the will, whether the legacy is specific or pecuniary, and not to travel into the account of the effects to see whether that affords a foundation for making a legacy specific (c).

Inclination
of the Court
against Specific
Legacies.

In the case of *Oneale v. Meade* (d), H., 1720. A man seised of an estate in fee which he had mortgaged for 500*l.* and also possessed of a leasehold, devised the mortgaged estate to his eldest son in fee, and the leasehold estate to his wife, and died, leaving debts which would exhaust all his personal estate, except the leasehold given to his wife. The question was, whether there being (as usual) a covenant to pay the mortgage money, the leasehold premises devised to his wife should be liable to discharge the mortgage. It was decreed by the Master of the Rolls that as the testator had charged his real estate by this mortgage, and also specifically bequeathed the leasehold to his wife, the heir shall not disappoint her legacy by laying the mortgage debt upon it, as he might have done had it not been specifically devised ; and though the mortgaged premises were also specifically given to the heir, yet he must take them with their burden as probably they were intended, and that by this construction, each devise would take effect ; and that this resolution did not in the least interfere with the case of *Clifton v. Burt* (e), M., 1720, because in that case there was no mortgage.

Oneale
v.
Meade.

When the
Heir shall not
be exonerated
at the cost of
the Legatee.

And as there is a benefit to a specific legatee that he shall not contribute, so there is a hazard the other way : for instance, if such specific legacy, being a lease, be evicted, or being goods be lost or burnt, or being a debt be lost by the insolvency of the debtor, in all these cases the specific legatee shall have no contribution from the other legatees, and therefore shall pay no contribution towards them (f).

Disadvantage
and advantage
of Specific
Legatee.

If a specific legacy be retained by an executor for assets, but is not wanted, the legatee is entitled to the original value in case of depreciation (g).

(c) [*Innes v. Johnson*,] 4 Ves. 568.

(d) 1 P. Wms. 693.

(e) 1 P. Wms. 678, *et supra*, in note.

(f) [*Hinton v. Pinke*,] 1 P. Wms. 540.

(g) [*Chaworth v. Beech*,] 4 Ves. 555.

A legacy is not specific without something to mark the specific thing, as by describing it "my stock." A mere direction to transfer so much stock to a person is not sufficient to make a legacy specific (*h*).

But the devise of an annuity for life, charged on the personal estate, where there is a deficiency of assets, shall abate in proportion with the other legatees; for this is not to be considered as a specific legacy (*i*).

Annuitant.

An annuitant falls under the general character of a legatee, unless distinguished by the testator; it was therefore held that he was entitled to share under a residuary bequest in favour of legatees (*k*).

Charities.

Also charities, though preferred by the civil law, yet they ought to abate in proportion (*l*).

Executors' own Legacies.

And if the testator's personal estate is not sufficient to pay all legacies, the executors having legacies bequeathed them shall abate in proportion with the other legatees, even though the legacies be given them for their care and trouble, and not generally, for those are only words of course, and as they need not take upon them the office unless they please, they accept the legacies subject to that contingency (*m*), [although they may retain their own *debts*.]

Legatees in Land and Monies.

In like manner land legatees and money legatees shall abate proportionably (*n*).

If the executor hath only bad debts, he may offer to assign them to the legatee, and shall be quit (*o*).

When the Specific Legatee shall stand in the place of the Bond Creditor or Mortgagee.

If a man by will gives a lease, or a horse, or any specific legacy, and leaves a debt by mortgage or bond in which the heir is bound, the heir shall not compel the specific legatee to part with his legacy in ease of the real estate; for though the creditor may subject this specific legacy to his debt, yet the specific or other legatee shall in equity stand in the place of the bond creditor or mortgagee, and take as much out of the real assets as such creditor by bond or mortgage shall have taken from his specific or other legacy (*p*).

But if one owes debts by bond or mortgage, and deviseth his lands to another in fee, and leaves a specific legacy, and dies, and the bond creditor or mortgagee comes upon the specific legacy for payment of his debt, the specific legatee shall not stand in the place of the bond creditor or mortgagee to charge the land, because the devisee of the land is as much a specific devisee as the legatee of a specific legacy, for it was as much

(*h*) *Sibley v. Perry*, 7 Ves. 522.

(*i*) 3 Atk. 693.

(*k*) *Sibley v. Perry*, 7 Ves. 522;

[As to the rights of annuitants, see *Farmer v. Mills*, 4 Russ. 86; *Scott v. Salmond*, 1 M. & K. 363.]

(*l*) *Att.-Gen. v. Robins*, 2 P.Wms. 25.

(*m*) 2 P.Wms. 25; *Barnard. Cha.*

Rep. 435; 2 Atk. 171; [Toller, 347; *vide supra*.]

(*n*) 2 Cha. Ca. 155.

(*o*) 1 Ought. 370, 371.

(*p*) *Tipping v. Tipping*, 1 P.Wms.

730.

the testator's intention that the devisee should have the land as that the other should have the legacy, and a specific legacy is never broke in upon in order to make good a pecuniary one (*q*).

When the Specific Legatee shall stand in the place of the Bond Creditor or Mortgagee.

But if a man, indebted by mortgage, deviseth his lands to another in fee, (after payment of his debts and funeral charges), and also doth bequeath divers pecuniary legacies, and the personal estate is not sufficient to satisfy both the legacies and the mortgage, in such case, if the mortgagee shall not hold to the real, but shall fall upon the personal estate, the legatees shall stand in his room for so much out of the real estate as he shall take out of the personal, that being a proper fund for their payment (*r*).

So if a man gives legacies to his daughters, charging his real estate with the payment thereof, and other legacies to his brother without charging his real estate with the payment of these; if the daughters recover their legacies out of the personal estate, then the brother shall stand in the place of the daughters, and take so much out of the land for his legacy as the daughters had exhausted out of the personal assets (*s*).

A legacy charged upon a real estate, and payable at a future day, sinks as to the real estate by the death of the legatee before the time of payment, and the assets cannot be marshalled (*t*).

Where there are divers executors, and some of them are dead, the legatary must sue the surviving executors, and not the executors or administrators of those that are dead. And if all the executors are dead, he must sue the executors or administrators of him that died last, and not the executors or administrators of the rest; and the reason is, because it is presumed that the goods of the deceased not administered by the other executors remained with the surviving executor, or if they

Co-Executor dying, who shall be sued.

(*q*) *Haslewood v. Pope*, 3 P. Wms. 324; *Hern v. Merick*, 2 Salk. 416. It does not appear in *Hern v. Merick* as in *Haslewood v. Pope*, that the pecuniary legacy was *specific*. The case, with the reason of the decision, is thus stated by C. B. Gilbert, in *Lex Prætoria*, § "Wills," "A. seised in fee and indebted by bonds, gives by his will legacies to his younger children, (whom he had otherwise provided for before), and devises his land to his eldest son in tail, whom he also made executor. The eldest son pays the bonds with the personal estate, whereupon the legatees, in the place of the bond creditors, bring their bill against the real estate, to be paid out of it, and the bill was dismissed; first, be-

cause where there is an express specific legacy of any particular thing they do not commonly break into such specific legacies in favour of the pecuniary legacies; but, secondly, because the children in this case being provided for in the life of the testator, their legacies are not upon meritorious consideration, (as in satisfaction of a debt, or as provision for younger children), and therefore according to a former rule, being mere volunteers, they are not to induce a charge on the real estate."

(*r*) Cas. Talb. 53.

(*s*) *Stanley v. Leigh*, 2 P. Wms. 619.

(*t*) *Pearce v. Loman*, 3 Ves. 135.

did not, it was through his own default; because, when the other executors were dead, he might and ought to have proceeded against their executors or administrators for restitution of the goods not administered (*u*).

Testator appointing his Debtor Executor.

If a creditor appoint a debtor his executor, such appointment shall operate as a release and extinguishment of the debt, on the principle that, from that act of the testator, it may be reasonably inferred that such was his meaning. The debt, under these circumstances, is considered in the nature of a specific bequest or legacy to the debtor for the purpose of discharging the debt. Thus, if the obligee of a bond make the obligor his executor, this amounts to a release of the debt (*x*).

So if an obligee in a joint and several bond make one of two obligors his executor with others, the action on the bond is discharged as to both obligors (*y*).

[As to stamp duties on legacies, *vide supra*.—ED.]

2. Concerning the Distribution of the Intestates' Effects.

1. Of the Statutes of Distribution	526	2. Of Customs in particular Places	564
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1. Of the Statutes of Distribution.

22 & 23 Car. 2,
c. 10.

By the 22 & 23 Car. 2, c. 10, commonly called the Statute of Distribution, it is enacted as followeth, sect. 3, "All ordinaries, as well the judges of the Prerogative Courts of Canterbury and York, as other ordinaries and ecclesiastical judges, and every of them, having power to commit administration of the goods of persons dying intestate, shall and may and are enabled to proceed and call administrators to account, for and touching the goods of any person dying intestate; and upon hearing and due consideration thereof, to order and make just and equal distribution of what remaineth clear (after all debts, funeral and just expenses of every sort first allowed and deducted), amongst the wife and children, or children's children, if any such be, or otherwise to the next of kindred to the dead person in equal degree, or legally representing their stocks *pro suo cuique jure*, according to the laws in such cases, and the rules and limitations hereafter set down: and the same distributions to decree and settle, and to compel such administrators to observe and pay the same by the due course of his majesty's ecclesiastical laws; saving to every one supposing him or themselves aggrieved, their right of appeal, as was always in such cases used."

(*u*) 1 Ought. 364.

(*y*) *Cheetham v. Ward*, 1 Bos. & Pul. 630; [*vide supra*, p. 152.]

(*x*) Toller's Law of Executors, 272.

Sect. 4. " Provided, that this act, or any thing herein contained, shall not any ways prejudice or hinder the customs observed within the city of London, or within the province of York, or other places, having known and received customs peculiar to them; but that the same customs may be observed as formerly, any thing herein contained to the contrary notwithstanding."

Construction
of the Sta-
tutes of Dis-
tribution.

Sect. 5. " And all ordinaries and other persons by this act enabled to make distribution of the surplusage of the estate of any person dying intestate, shall distribute the whole surplusage of such estate or estates, in manner and form following; that is to say, one-third part of the said surplusage to the wife of the intestate, and all the residue by equal portions, to and amongst the children of such persons dying intestate, and such persons as legally represent such children, in case any of the said children be then dead, other than such child or children (not being heir at law), who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime, by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made. And in case any child, other than the heir at law, who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portion not equal to the share which will be due to the other children by such distribution as aforesaid; then so much of the surplusage of the estate of such intestate, to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal as near as can be estimated. But the heir at law, notwithstanding any land that he shall have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of the land which he hath by descent or otherwise from the intestate."

Sect. 6. " And in case there be no children, nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the intestate, the residue of the said estate to be distributed equally to every of the next of kindred of the intestate, who are in equal degree, and those who legally represent them."

Sect. 7. " Provided, that there be no representation admitted among collaterals, after brothers' and sisters' children. And in case there be no wife, then all the said estate to be distributed equally to and amongst the children. And in case there be no child, then to the next of kindred in equal degree of or unto the intestate, and their legal representatives, as aforesaid, and in no other manner whatsoever."

Construction
of the Sta-
tutes of Dis-
tribution.

Sect. 8. " Provided also, and be it enacted, to the end that a due regard be had to creditors, that no such distribution of the goods of any person dying intestate be made, till after one year be fully expired after the intestate's death; and that such and every one to whom any distribution and share shall be allotted, shall give bond with sufficient sureties in the said courts, that if any debt or debts truly owing by the intestate shall be afterwards sued for and recovered, or otherwise duly made to appear, that then and in every such case he or she shall respectively refund and pay back to the administrator his or her rateable part of that debt or debts, and of the costs of suit and charges of the administrator by reason of such debt, out of the part and share so as aforesaid allotted to him or her, thereby to enable the said administrator to pay and satisfy the said debt or debts so discovered after the distribution made as aforesaid."

Sect. 9. " Provided always, and be it enacted, that in all cases where the ordinary hath used heretofore to grant administration *cum testamento annexo*, he shall continue so to do, and the will of the deceased in such testament expressed shall be performed and observed, in such manner as it should have been if this act had never been made."

And by the 29 Car. 2, c. 3, s. 25, for explaining the said statute, it is declared, that nothing therein " shall extend to the estates of *femes covert*s that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said act."

And by the 1 Jac. 2, c. 17, " If after the death of a father any of his children shall die intestate without wife or children, in the lifetime of the mother, every brother and sister, and the representatives of them, shall have an equal share with her, any thing in the said act to the contrary notwithstanding." [*Vide infra*, the case of *Stanley v. Stanley*, in which it is said, that the word " and" immediately preceding the words " the representative" is to be construed *disjunctively*.

[The two objects of this statute, it has been said, by a learned judge, are—one, that the residue shall be forthcoming; another, that it shall be duly divided (a).—ED.]

State of the
Law before
the Statutes of
Distribution.

Enabled to proceed to call Administrators to account.]—At common law, no person at all had a right to administer, but it was in the breast of the ordinary to grant it to whom he pleased, till the statute of the 21 Hen. 8 was made, which gave it to the next of kin; and if there were persons of equal kin, whichever took out administration was entitled to the surplus. And for this reason, this statute of the 22 & 23 Car. 2,

(a) [*Archbishop of Canterbury v. Robertson*, Bayley, B., 1 Cr. & Mee. 705.]

was made in order to prevent this injustice, and to oblige the administrator to distribute (b).

Construction
of the Sta-
tutes of Dis-
tribution.

Of any Person dying intestate.]—T., 8 Will. 3, *Petit v. Smith* (c). Prohibition was granted to the Delegates, to stay a suit there, because they compelled an executor to make distribution of the surplus, he having 50*l.* devised to him as a legacy; because, there being a will, and an executor, the spiritual court cannot compel distribution, but only where the party dies intestate.

The Spiritual
Court cannot
compel Dis-
tribution of
the Residue
where there
is a Will.

And in the case of *The King v. Sir Richard Raines*, M., 10 Will. 3 (d), if an executor be sued in the ecclesiastical court to make distribution, he not being residuary legatee, though that were allowed by the canon law, yet the King's Bench would grant a prohibition to stay any such suit; for all suits for distributions were prohibited by the King's Bench, until the statute of the 22 & 23 Car. 2, c. 10, made them lawful; and they are only lawful so far as is warranted by that statute, which is only in case of persons dying intestate.

Hatton v. Hatton, E., 3 Geo. 2 (e). Strange moved for a prohibition to the Prerogative Court, in a suit there instituted by the next of kin against the executor, to make distribution of the surplus, there being a specific legacy to the executor; for that although there have been variety of decisions upon this point in courts of equity, where they have sometimes held the executor to be a trustee for the next of kin as to the surplus, yet there was no instance of the spiritual court's judging of a trust, or setting up any interest contrary to the common law. He insisted, that in the case of a will the judge below is *functus officio*, when he hath granted probate, as to all purposes but calling for an inventory according to the statute of the 21 Hen. 8, c. 5. And he cited the case of *Petit v. Smith*, as reported in the 5 Mod. 247, where the testator gave 50*l.* to the executor, and the daughter cited him to make distribution, and a prohibition was granted. And in a report of the same case in Comb. 378, it is said by Holt, Chief Justice, they never pretended to distribution in the case of an executor; and they only do it in case of an administrator by virtue of the statute; and he denied the notion in 2 Inst. 33, that executors must divide. Dr. Sayer, on the contrary, endeavoured to maintain, that the spiritual court had concurrent jurisdiction with the Court of Chancery in this case, as well as in legacies; and insisted that this is a partial intestacy, as to the surplus. But the court was clearly of opinion, that the spiritual court could not intermeddle; and said, that in case of an intestacy, they used to be prohibited, as in Carter, 125; 1 Lev. 233, and that the statute of distribution enlarged, and not barely confirmed

(b) 1 Atk. 459; [*Stanley v. Stanley*, vide infra, "Account."] (c) Ld. Raym. 86.

(d) Ld. Raym. 363.

(e) Str. 865.

Construction
of the Sta-
tutes of Dis-
tribution.

Nor order the
Testator's
Goods to be
brought in.

But may re-
fuse to pro-
ceed until it
be brought in.

Domicil.

their power, as appears by the history of that statute in Raym. 496, &c. And the rule for a prohibition was made absolute. And the court offered, that if the common lawyers on the doctor's side, who were Reeve, Lee, and Fazakerley, would say that they thought there was any thing in it, the plaintiff should declare in prohibition; but they declined it.

To order and make just and equal Distribution.—*Clerke v. Clerke*, T., 10 Will. 3(f). Clerke died intestate. His wife took out letters of administration to him. Clerke, brother to the intestate, cited the defendant into the spiritual court, to make distribution of the intestate's estate. The defendant there suggests, that the brother hath goods of the intestate in his hands to the value of 200*l.* And upon this the spiritual court orders him to bring the 200*l.* into court, to the end it may be distributed. And for not bringing it in they excommunicate him. Upon which he moves in the King's Bench for a prohibition; and it was granted as to the whole process that compelled him to bring in the 200*l.* For by the court: The spiritual court hath power to make distribution of the estate, when it is come in, but not to fetch it in; because that is to hold plea of debt: but *the spiritual court might refuse in this case to proceed to the distribution*, until the brother had brought in the 200*l.*; but they cannot excommunicate him for not bringing it in.

Distribution.—Where there is only *one* person that can take, the statute vests the right in that person, although in such case it is not strictly and literally a distribution (g).

The personal estate of an intestate, wherever situated, must be distributed by the law of the country where his domicil was (h). And for that purpose there can be but one domicil, and the *lex loci rei sitæ* does not prevail. The mere place of birth or death does not constitute the domicil. The original domicil of a man, which arises from his birth and connections, remains until clearly abandoned, and another taken (i). [Lord Alvanley: A domicil in India is considered as a domicil in the province of Canterbury (k).—ED.]

Shall not any ways prejudice or hinder the customs observed within the city of London, or within the province of York or other places.—Which customs will be considered in their order afterwards.

(f) Ld. Raym. 585. [See also, *Bruce*, 2 Cr. & Jerv. 445; *Att.-Gen. v. Dunn*, 6 Mees. & Wels. 511; *Munroe v. Douglas*, 5 Madd. 405;

(g) 3 P. Wms. 50.

(h) *Bempde v. Johnstone*, 3 Ves. 198.

(i) *Somerville v. Lord Somerville*, 5 Ves. 750. [See also, *Stanley v. Bernes*, 3 Hagg. 73; *De Bonneval v. De Bonneval*, 1 Curt. 856; *In re*

Toml. ed.; Pottinger v. Whightman, 3 Meriv. 79; *vide supra*, "Domicil," p. 243.]

(k) [*Munroe v. Douglas*, 5 Madd. 406.]

One-third part of the said surplusage to the Wife of the Intestate.—*Davers v. Dewes*, T., 1730 (l).

[This applied even to a papist widow under the severity of the old popery laws.—ED.]

Garthshore v. Charlie (m). By indentures previous to marriage, John Charlie covenanted, in the event of his death, leaving his wife surviving and children, that his heirs, executors, &c., should, within six months after his decease, convey, pay, and assign one full and clear moiety of all such real and personal estate as he shall be seised and possessed of, or entitled to at his decease, unto and for the proper use and benefit of his wife, her heirs, executors, &c. Upon the principle of part performance, it was held that the widow was not entitled, in addition to the moiety under the covenant, to a third of the residue of the personal estate by the intestacy of her husband.

[A settlement before marriage may bar even a female infant of her share (n).

[*Colleton v. Garth* (o). Where the husband on his marriage settles on his wife a rent-charge for her jointure, and in lieu of dower and thirds at common law, she is not thereby precluded from her distributive share in his undisposed of *personalty*. The rent-charge will be held to be in lieu of her claims on his *realty*.

[But when the husband makes a provision for his wife in his will, and expresses his intention that it shall be in lieu of her distributive share, and subjects his will to a disposition which becomes void, so that the part so disposed of becomes subject to distribution; then, notwithstanding the words in the will, the widow will be entitled to her distributive share (p). But see further, on the subject of the rights of the widow in distribution of the effects of her intestate husband, the second volume of Mr. Roper's work on Husband and Wife.—ED.]

The Residue—to and amongst the Children.—*Ball v. Smith*, M., 1698 (q). An infant *in ventre sa mere* at the time of the death of the father, was held clearly by the Lord Chancellor to be entitled to a share by the statute of distribution; for he is, in the eye of the law, a child, and ought to be provided for as well as the rest.

[Where a testator leaves an only child and a widow, the rate of distribution is not altered: she shall only have a third part, and the child two-thirds (r). Where there is no widow,

(l) 3 P. Wms. 48.

(m) 10 Ves. 1.

(n) [*Lord Buckinghamshire v. Drury*, 3 Bro. P. C. 492; S. C. 2 Eden, 60.]

(o) [6 Sim. 19.]

(p) [*Pickering v. Stamford*, 3 Ves.

332; *Garthshore v. Charlie*, 10 Ves. 1.]

(q) 2 Freem. 230; [*Edwards v.*

Freeman, 2 P. Wms. 466; *Burnet v. Man*, 1 Ves. sen. 156.]

(r) [*Brown v. Farndell*, Carth. 52; Bac. Abr. tit. Executors, I. 5.]

Construction
of the Sta-
tutes of Dis-
tribution.

Widow's
Claim.

May be
barred by
Settlement.

By Will.

Construction
of the Sta-
tutes of Dis-
tribution.

Heir at Law.

Hotchpot or
*Collatio Bo-
norum*.
Advance-
ment.

Where the
Heir at Law
is the young-
est Son.

and an only child, it shall be entitled to all the personalty (s).
—ED.]

Other than such Child or Children, not being Heir at Law.—Although by this statute the heir at law shall not abate in respect of the land which he hath by descent or otherwise from the intestate, yet if he hath had any advancement from his father in his lifetime, otherwise than by land as aforesaid, he shall abate for the same, in like manner as the other children.

In like manner it seemeth that *co-heiresses* shall bring together into hotchpot such advancement (not being lands) as they shall respectively have received from their father, before they shall be entitled to receive their several distributive shares, agreeably to the general purport of the act, which is evidently to promote an equality as much as may be.

Note, Littleton saith (t) that *hotchpot* signifieth a pudding; unto which his learned commentator assenteth: but this doth not explain to us the meaning of the word, but carries us further from it; for it doth not import that kind of food in general, but metaphorically such only as is compounded of divers ingredients. *Hotch* is a Saxon word, not yet altogether out of use, and signifieth to *shake*; and *pot* is a word well known. And the compound *hotch-pot* is nothing but shaking things together in an urn or other vessel, and is easily transferred to a commixture of the children's portions: and this is what by the civilians is called *collatio bonorum* (u).

[It should be observed, that the statute takes nothing away that has been given to any of the children; therefore, however undue the share so given to the child may be, compared with the remainder of the estate left at the testator's death, the child cannot be compelled to bring such gift into hotchpot (x).

[The statute only provides for an *intestacy*. Where there is an executor appointed, there is a complete will; and in this case the children will take the residue as if it had been actually given to them; nor will a child advanced by his father, or provided for in the will, be compelled to bring his share into hotchpot (y).—ED.]

Heir at Law.—*Pratt v. Pratt*, E., 5 Geo. 2 (z). At the Rolls. Lord Chief Justice Pratt died seised of borough English lands, leaving several children; and having made no will, it became a point upon the statute of distribution whether the youngest son (to whom the lands descended by the custom of borough English) should abate for these lands, or should be considered as an heir at law, who by the statute is to

(s) [*Davers v. Dewes*, 3 P. Wms. Wms. 443. *Vide post.*]
49, a. D.]

(t) 1 Inst. 176.

(u) [2 Black. Com. 517.]

(x) [*Edwards v. Freeman*, 2 P.

(y) *Walton v. Walton*, 14 Ves.
324; [2 P. Wms. 440, Sir W. Grant.]

(z) Str. 935.

have a distributive share without any allowance for lands by descent. And it was ruled by Sir Joseph Jekyll, Master of the Rolls, that he should allow for these lands; for he said the statute only intended to provide for the heir of the family, who is the common law heir, and not for one who is only heir by custom in some particular places.

Construction
of the Sta-
tutes of Dis-
tribution.

Where the
Heir at Law
is the young-
est Son.

But in the case of *Lutwyche v. Lutwyche*, E., 1733 (a), Thomas Lutwyche, Esquire, died intestate, possessed of a personal estate, and seised of a copyhold in fee, at Turnham Green, which was in the nature of borough English. The question was, whether the youngest son, upon whom the copyhold descended, should have an equal share with the other children of the personal estate, exclusive of the copyhold, or only so much as with that copyhold would make his portion equal to that of the other children. By Talbot, Lord Chancellor: The heir at law is the eldest son, and not the heir in borough English; and the exception in the statute extends only to the eldest son. Yet, nevertheless, the youngest son, who is heir in borough English, shall not bring the borough English estate into hotchpot. There is no law to oblige him to do this, but only this statute; and there are no words in the statute that require it; for the statute speaketh only of such estate as a child hath by settlement, or by the advancement of the intestate in his lifetime. And it was decreed that the youngest son should have an equal share with the other children, without regard to the value of the borough English estate.

And the case of *Pratt v. Pratt* came after this case before the Lord Chancellor Talbot; and he reversed the decree of the Master of the Rolls, and decreed agreeably to this case.

Who shall have any Estate by the Settlement of the Intestate, or shall be advanced by the Intestate in his Lifetime.]

What is Ad-
vancement.
Not small
Sums.

—It hath been determined that small inconsiderable sums, occasionally given to a child, cannot be deemed an advancement or part thereof. Thus, maintenance money, or allowance made by the father to his son at the university, or in travelling, or the like, is not to be taken as any part of his advancement, this being only his education; and it would create charge and uncertainty to inquire minutely into such matters. So putting out a child apprentice is no part of his advancement; for it is only procuring the master to keep him for seven years instead of the parent. *Hender v. Rose*, T., 1718, at the Rolls. But the father's buying an office for the son, though but at will, as a gentleman pensioner's place, or a commission in the army, these are advancements *pro tanto*. *Norton v. Norton*, M.,

(a) Cas. Talb. 276.

Construction
of the Sta-
tutes of Dis-
tribution.

Marriage Set-
tlement.

1692. By the lords Commissioners Rawlinson and Hutchins (b).

Also a provision made by a *marriage settlement*, although it is in the nature of a purchase, yet is such an advancement as that a child claiming a distributive share shall first bring the said advancement into hotchpot. As in the case of *Phyney v. Phyney*, H., 1708. The father, on his son's marriage, covenanted, in case of a second marriage, to pay to the first son by the first wife 500*l*. There was a son, and several other children of the first marriage. The father of these children died intestate. By the Court: The heir must bring the 500*l*. into hotchpot, although in nature of a purchaser under a marriage settlement (c).

So in the case of *Edwards v. Freeman* (d), M., 1727. Before King, Lord Chancellor, assisted by Raymond, Chief Justice, and the Master of the Rolls, and Price and Fortescue, Justices. Mr. Freeman, on his marriage, entered into articles, in consideration of the said marriage, and of 4000*l*. portion, to settle an estate to raise portions for daughters in case there were no sons, that is to say, if but one daughter the sum of 5000*l*., if two or more then the sum of 6000*l*. equally amongst them, to be paid at their respective ages of eighteen years, or days of marriage, which should first happen, and 80*l*. a year maintenance in the meantime to each daughter. The marriage took effect, and they had issue one daughter only, and no son. Then the wife dies. Afterwards Mr. Freeman married a second wife, and had by her a son and a daughter, and died intestate, leaving a personal estate to the amount of 20,000*l*. The daughter by his first wife at that time was about twelve years of age, and some time after married the plaintiff Mr. Edwards; and they brought their bill to have an account of the personal estate of Mr. Freeman, and their distributary share thereof. And the only question was, whether this 5000*l*. should not be looked upon to be so far in advancement of the plaintiff the wife of Mr. Edwards, that if she would have any farther share of her father's personal estate, they must bring this 5000*l*. into hotchpot. For the plaintiffs it was argued, that they were entitled to a distributary share without regard to this 5000*l*., which was no advancement either within the words or meaning of the act, which intended only an advancement of children after they are in being, and when they are about being married or disposed of in the world; but this, if any, was an advancement long before the plaintiff was born, and when it was wholly unknown and uncertain whether there ever would be such a

(b) 3 P. Wms. 317; *Lord Kircudbright v. Lady Kircudbright*, 8 Ves.

51; [*Elliot v. Collier*, 1 Ves. sen. 16;

S. C. 3 Atk. 528; Swin. pt. 3, s. 18,

pl. 30.]

(c) 2 Vern. 638.

(d) 1 Abr. Eq. Cas. 249; S. C. 2

P. Wms. 435.

daughter. That it was likewise contingent and uncertain, after she was born, whether she would ever be entitled to this fortune or not; for if she had died before eighteen or marriage, it would have sunk into the inheritance for the benefit of the heir; and she was but twelve years of age at the time of her father's death, and therefore might have died before she was entitled to this 5000*l*. That the statute must operate either at the time of the father's death, or within a year after at furthest; but in this case the plaintiff was not entitled to her 5000*l*. either in her father's lifetime or within a year after, and the distribution was not to wait till it should appear whether she would attain eighteen or be married: That this 5000*l*. was not a voluntary provision moving from the father, but the plaintiff was a purchaser thereof, in consideration of her mother's portion; and suppose a child had money of his own, and agreed with his father, in consideration thereof, to have a portion from his father after his death; or if a collateral relation had purchased such a portion from the father for his child, certainly this would not be an advancement; and the intent of the statute was, to make them all equal out of the father's personal estate, not out of what was purchased for them by others, or by the mother, as in this case. On the other side, it was argued for the defendants, that the 5000*l*. thus provided for by the settlement was an advancement within the meaning of the statute, which appears throughout to intend and preserve an equality between the children: That the statute makes no distinction whether it was a voluntary provision of the father, or arose from the contract of the parties; and a child provided for either way, is provided for; and it is not like the cases put, where a child, either with his own or a relation's money, purchases an estate, or a sum of money from the father, but a direct sale, as much as it would have been to any stranger: That this portion, though not payable till after the father's death, was nevertheless a provision for her by him in his lifetime, as the act speaks, as the principal part of it, to wit, the security, was executed by him in his lifetime; and as he was not at liberty to control it; and suppose he had given such a portion payable at his death, this would certainly have been a good provision within the statute; and here the portion is payable as soon as possibly it can be wanted, namely, at eighteen or marriage, and a maintenance of 80*l*. a year in the meantime; and though it is true that a portion out of land sinks in the inheritance if the party dies before it becomes payable, which if it were a personal estate it would not, yet that is not material here, since the statute makes no distinction whether the portion is payable out of the real or personal estate: That if a bill had been brought immediately after the father's death for a distribution, there could be no inconvenience in setting apart a sum to answer the contingency, when it should happen, no more than in the case of debts,

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of Distribu-
tion.

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tion.

which is every day done; and there are some whose estates are not got in till several years after their deaths, and a distribution may very properly be made thereof from time to time as they come in. And the court were all clear of opinion, that this was an advancement by the father in his lifetime, within the meaning of the statute, though contingent and future, so that she could not have that and her distributory share likewise. And the Master of the Rolls said, that the civil law made no difference between a real and personal estate, but only moveable and immoveable; and the words of the act, which speak of a provision made by the father in his lifetime, are very proper to distinguish between that and a provision made by his will. And the Chief Justice said, suppose the father had left but 2000*l.* personal estate, it would be extremely hard that the eldest daughter should have her 5000*l.* and a share of the 2000*l.* also. And the Lord Chancellor said, he thought any settlement in or out of lands, either by annuity, rent, or portion, would be a provision within the statute; and that such provision might be valued and brought into the *collatio bonorum*, if they think it worth their while; that the 5000*l.*, whether called contingent or not, is an interest, and such a one as would happen within a reasonable time, to wit, six or seven years after the father's death; that the distribution must be made as the estate stands at the father's death, and the parties are to give bond to refund if debts afterwards appear; and future debts due to the intestate must be distributed as they can be got in; that here the contingency has happened, and she is now at liberty to say whether she will stick to that provision, or bring it into the computation of *collatio bonorum*, in order to have an equal share with the rest. But as to the 80*l.* a year maintenance, that is not to be brought in, being only for the education and maintenance of the daughter, which the parents were best judges of.—And accordingly the decree was pronounced.

So in the case of *Lloyd v. Twitsham*, H., 1715 (e), the Lord Chancellor Cowper was of opinion, that the word *portion* in the statute, with respect to younger children, includes an estate in *land* as well as in money; and that this land, in the computation of the estate to be distributed, is to be added to, and computed with the other parts of it; but with respect to the eldest son, whatever land came to him from his father, by descent or otherwise, he is to have his share, without any consideration of the value of such land.

So if the father settles a *rent* out of his lands upon a younger child, this is an advancement (f).

Likewise if the father by deed settles an *annuity* upon a child, to commence after his death, this is an advancement *pro tanto*;

(e) Vin. Executors (Z. 10), 3.

(f) 2 P.Wms. 441.

and by the same reason, a *reversion* settled on a child, as it may be valued, is an advancement also (*g*).

Construction of the Statutes of Distribution.

Lord Kircudbright secured by bond to his eldest son an annuity, and afterwards died, the payments having been made till that event took place. It was held that the annuity was to be brought into hotchpot (*h*).

But whatever a child receives out of the *mother's* estate, it is said, shall not be brought into hotchpot. As in the case of *Holt v. Frederick*, T., 1726 (*i*). A man married, and had three children, two sons and a daughter. His wife survived him; and having, out of her own estate, given 1000*l.* to her daughter in marriage, died intestate, leaving those three children. The question was, whether the daughter, who had received this 1000*l.*, ought to bring it into hotchpot before she should receive any further share of her mother's personal estate. The Lord Chancellor King said it weighed with him, that the act of distribution was grounded upon the custom of London, which never affected a *widow's* personal estate; and that the act seems to include those within the clause of hotchpot who are capable of having a wife as well as children, which must be husbands only. And so in this case (though without much debate) his lordship ruled, that the daughter should not bring the 1000*l.* which she had received in her mother's lifetime into hotchpot.

Out of the Mother's Estate.

And if a child who has received any advancement from his father shall die in his father's lifetime, leaving children, such children shall not be admitted to their father's distributive share without bringing their father's advancement into hotchpot. As in the case of *Proud v. Turner*, M., 1729 (*k*). A father had several children, and in his lifetime advanced in part one of them. The child thus advanced in part died in his father's lifetime, leaving issue. Afterwards the father died intestate, possessed of a considerable personal estate. It was ruled that the issue of the dead child must bring into hotchpot what their father received in part of advancement, as he, if living, must have done; in regard the issue stands in the place and stead of the father, claims under him, and cannot be in a better condition than the father, if living, would have been, and had claimed his distributive share.

Children of a Father who has been advanced.

And the reason is, because such children do not take in their own right, but as representing their father deceased. But whether those grandchildren, having been advanced some more some less by their father in his lifetime, shall bring their several advancements into hotchpot one with the other, before they shall distribute their deceased father's share of their grand-

Qu. Whether Grandchildren advanced by the Testator must bring their Advancement into Hotchpot before they distribute their Father's Share of their Grandfather's Estate.

(*g*) 2 P. Wms. 442.

(*i*) [*Holt v. Frederick*, 2 P. Wms.

(*h*) 8 Ves. 51. [*Kircudbright v. Kircudbright*, and *Gilbert v. Wethe-*
rell, 2 Sim. & Stu. 254, (Sir J. Leach, M. R.)]

356, (Lord King, Ch.); S. C. 2 Eq. Cas. Abr. 446.]

(*h*) 2 P. Wms. 560.

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of the Statutes
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tion.

father's personal estate, doth not appear to have been determined. If their father also died intestate, then it seemeth that they shall be required to bring into hotchpot; for in such case they take, not from their grandfather, but from their father: and this brings it within the general rule aforegoing.

But where there are only grandchildren, their fathers or mothers respectively having died in the lifetime of their grandfather, in such case they take in their own right, and not by representation of their father or mother deceased. Whether these also shall bring into hotchpot, either all together, or those descended from the same stock amongst themselves respectively, may upon the like grounds be matter of doubt. But it seemeth that this case is farther off from the rule than the former. For here they do not take by representation, but each in his own right. And the statute doth not seem to require that the *collatio bonorum* shall extend further than to children, or the *representatives* of such children. In like manner as the custom of London doth not extend to grandchildren (as will appear afterwards), so neither doth the custom of the province of York.

A doubt likewise may arise, and the solution thereof will be the same, where a grandchild hath received some advancement, not from his father, but from his grandfather, whether or no such grandchild shall bring his said advancement into hotchpot with the brothers and sisters of his father deceased. The grandchild in this case taketh not in his own right, but as representative of his father, and therefore, as it seemeth, should not bring his own portion, but only his father's portion, into hotchpot. But concerning these points, no adjudication hath occurred.

This question is discussed by Vinnius, in his tract *De Collationibus*, c. 12, where he quotes the opinion of some civilians, that if a grandfather leave a son and daughter, and grandchildren by a deceased daughter, which grandchildren had received advancement from their grandfather in his lifetime, they shall collate their advancements one with another, but not with their uncle and aunt; but he himself is of opinion that they shall collate with the brother and sister of their deceased mother.

Child partly
advanced.

By Portion not equal to the Share which would be due to the other Children.—A child partly advanced shall bring in its advancement only amongst the other children, but the wife shall have no advantage of it (m).

Next of Kin,
who are.

To every of the next of Kindred to the Intestate, who are in equal Degree.—Here it is very material to inquire, who are these *next of kindred in equal degree*? For the perfect understanding whereof, it is to be observed, that kindred are

(m) *Ward v. Lant*, Prec. Cha. 182, 148, H., 1701; [*Kirkcudbright v. Kirkcudbright*, 3 Ves. 32.]

distinguished either by the *right* line or by the *collateral*. The *right* line is of parents and children, computing by *ascendents* and *descendents*; the *collateral* line is between brothers and sisters, and the rest of the kindred among themselves (*n*).

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tion.

And forasmuch as proximity between two persons proceeds either from this, that they are descended one from the other, (which makes the connexion between ascendents and descendents), or from their being both descended of one and the same person, (which makes that of collaterals); we judge therefore of the proximity between two persons by the number of generations which make both the one and the other of the said connexions. And these generations are called *degrees*, by which we step from one person to another, in order to make the computation of their kindred in the manner hereafter explained (*o*).

Those of the right line are reckoned upwards, as parents; or downwards, as children: those of the collateral line are reckoned *ex transverso*, or sideways, as brothers and sisters, uncles and aunts, and such as are born from them (*p*).

And there is no difference between the *civil* and *canon* law in the ascending and descending line; but every generation, whether ascending or descending, constitutes a different degree. Thus, the father of John is related to him in the first degree, and so likewise is his son; his grandfather and grandson in the second; his greatgrandfather and greatgrandson in the third. This is the only natural way of reckoning the degrees in the direct line, and therefore universally obtains, as well in the *civil* and *canon*, as in the *common* law (*q*).

No Difference
in the as-
cending and
descending
Line between
the Civil and
Canon Law.

But there is a difference in reckoning the *collateral* line. Thus, if we would know in what degree of collateral kindred two persons stand according to the *civil* law, we must begin our reckoning from the one of them by ascending to the person from whom both are branched, and then by descending to the other to whom we do count, and it will appear in what degree they are. For example:—In brother's and sister's sons, take one of them and ascend to his father, there is one degree; from the father to the grandfather, that is the second degree; then descend from the grandfather to his son, that is the third degree; then from his son to his son, that is the fourth degree (*r*).

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between these
two Laws in
the collateral
Line.

But by the *canon* law there is another computation. For the canonists do ever begin from the stock, namely, from the person of whom they do descend, of whose distance the question is. For example:—If the question be, in what degree the sons of the two brothers stand by the canon law, we must begin from the grandfather, and descend to one son, that is one

(*n*) Ayl. Par. 327.

(*o*) 1 Strahan's Dom. 631.

(*p*) Ayl. Par. 327.

(*q*) Blackst. Descents, 8; [1 Bl. Com. 203.]

(*r*) 1 Inst. 23.

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degree; then descend to his son, that is another degree: then descend again from the grandfather to his other son, that is one degree; then descend to his son, that is a second degree. So in what degree either of them are distant from the common stock, in the same degree they are distant between themselves. And if they be not equally distant, then we must observe another rule, viz. in what degree the most remote is distant from the common stock, in the same degree they are distant between themselves, and so the most remote makes the degree (s).

Collateral kinsmen agree with the lineal in this, that they descend from the same stock or ancestor; but they differ in this, that they do not descend from each other. Collateral kinsmen then are such as lineally spring from one and the same ancestor, who is the *stirps*, root, or common stock, from whence these relations are branched out. As if John has two sons, who have each a numerous issue, both these issues are lineally descended from John as their common ancestor, and they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them *consanguinei* (t).

And the very being of collateral consanguinity consists in this descent from one and the same common ancestor. Thus, John and his brother are related; why? because both are derived from one father: John and his first cousin are related; why? because both descend from the same grandfather; and his second cousin's claim to consanguinity is this, that they both are derived from one and the same great-grandfather. In short, as many ancestors as a man hath, so many common stocks he hath, from which collateral kinsmen may be derived. And as we are taught by Holy Writ, that there is one couple of ancestors belonging to us all, from whom the whole race of mankind is descended, the obvious and undeniable consequence is, that all men are in some degree related to each other (u).

The different manner of calculating the degrees may perhaps be better apprehended by the annexed table; wherein it is to be observed, that the numeral Roman letters at the top express the degrees by the *civil* law, and the figures at the bottom express the degrees by the *canon* law.

And here it is evident that the degrees in the *descending* and *ascending* lines are by both laws the same. Thus the son is in the first degree, the grandson in the second, and the great-grandson in the third, by both laws in the *descending* line. So the father is in the first degree, the grandfather in the second, and the great-grandfather in the third, and so on, by both laws, in the *ascending* line.

But in the *collateral* line the calculation is different.

(s) 1 Inst. 24. (t) Blackst. Descents, 9, 10. (u) Ibid. 10, 11.

Thus the cousin german is in the fourth degree by the civil law, and in the second degree by the canon law. For by the civil law we ascend first to the father, which is one degree; from him to the common ancestor the grandfather, which is the second degree; from the grandfather we descend to the uncle, which is the third degree; and from the uncle to the cousin german, which is the fourth degree. By the canon law we begin at the common ancestor, the grandfather, and reckon downwards from him to the father, which is one degree; from the father to the intestate is the second degree: so, on the other side, from the grandfather to the uncle is the first degree; and from the uncle to the cousin german is the second degree: and by what degree they are distant from the common ancestor, by the same degree they are distant from each other, that is, in the second canonical degree. So in reckoning to the son of the nephew or brother's grandson: by the civil law we ascend to the father, which is one degree; from the father we descend to the brother, which is the second degree; from the brother to the nephew, which is the third degree; and from the nephew to the son of the nephew, which is the fourth degree. But by the canon law we begin at the common ancestor, the father, and reckon down from him to the intestate, which is one degree: then on the other side from the same common ancestor, the father, to the brother is one degree; from the brother to the nephew is the second degree; and from the nephew to the son of the nephew is the third degree: and by the rule before laid down, in what degree the further of them is distant from the common ancestor, in the same degree they are distant from each other; so that here the intestate and the son of his nephew or brother's grandson are distant by the canon law in the third degree of kindred.

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tributions.

And the reason of the different methods of computing the degrees of consanguinity in the collateral line, between the civil law on the one hand, and the canon law on the other, seemeth to be this: the civil law regards consanguinity principally with respect to successions, and therein very naturally considers only the person deceased, to whom the relation is claimed; it therefore counts the degrees of kindred according to the number of persons through whom the claim must be derived from him, and makes not only the son of his nephew, but also his cousin german, to be both related to him in the fourth degree, because there are three persons between him and each of them. The canon law regards consanguinity principally with a view to prevent incestuous marriages between those who have a large portion of the same blood running in their respective veins; and therefore looks up to the author of that blood, or the common ancestor, reckoning the degrees from him: so that the son of the nephew is related in the third canonical degree to the person proposed, and the cousin

Why there is
this Differ-
ence.

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german in the second; the former being distant three degrees from the common ancestor, and therefore deriving only one-fourth of his blood from the same fountain with the person proposed; the latter, and also the person proposed, being each of them distant only two degrees from the common ancestor, and therefore having one-half of each of their bloods the same (*x*).

For persons descended from one common ancestor in the first degree have the whole blood of their said common ancestor; in the second degree they have but half the blood of the said common ancestor; in the third degree they have but half of that half, that is, one-fourth; in the fourth degree, only half of that fourth, that is, one-eighth; in the fifth degree, one-sixteenth: and so on *in infinitum*.

The Common
Law follows
the Canon
Law.

The common law regards consanguinity principally with respect to descents (*y*), and having therein the same object in view as the civil, it may seem as if it ought to proceed according to the civil computation. But as it also respects the purchasing ancestor, from whom the estate was derived, it therein resembles the canon law, and therefore counts its degrees in the same manner. Indeed the designation of person, in seeking for the *next of kin*, will come to exactly the same end (though the degrees will be differently numbered), whichever method of computation we suppose the law of England to use, since the right of representation in the descent of real estates (of the father by the son, and so on) is allowed to prevail *in infinitum*. This allowance was absolutely necessary, else there would have frequently been many claimants in exactly the same degrees of kindred, as (for instance) uncles and nephews of the deceased; which multiplicity, though no inconvenience in the Roman law of partible inheritances, yet would have been productive of endless confusion where the right of sole succession, as with us, is established. The issue or descendents, therefore, of the brother of John are all of them in the first degree of kindred with respect to inheritances, as their father, when living, was; those of his uncle in the second, and so on, and are called to the succession in right of such their representative proximity.

The right of representation being thus established, the rule with regard to the descent of real estates amounts to this, that on failure of issue of the person last seised, the inheritance shall descend to the issue of his next immediate ancestor. Thus if John dies without issue, his estate shall descend to his brother, who is lineally descended from his next immediate ancestor, their father. On failure of brethren or sisters and their issue, it shall descend to the uncle of John, the lineal

(*x*) Blackst. Desc. 41, 42.

(*y*) [See Mr. Christian's note to 2 Bla. Com. 207.]

descendent of their common ancestor, the grandfather, and so on (z).

Construction of the Statutes of Distributions.

But this representation *in infinitum* amongst collaterals is not admitted in the succession to personal estate, the same being restrained and limited by the statute (as will appear afterwards.)

Representations in general governed by Rules of Civil Law.

In the case of *Wingate v. Fitch*, M., 21 Jac. 1 (a), administration upon the statute of Henry 8 was granted to the brother of the half blood. The brother of the whole blood appealed to the Delegates, alleging that he was nearer of kin by the ecclesiastical law; and the Delegates inclining to repeal the administration, and to grant it to the brother of the whole blood, a prohibition was granted to try the matter thereupon by the common law; for this being ordained by statute, it was said that it ought to be interpreted according to the common law.

And in the case of *Blackborough v. Davis*, E., 13 Will. 3 (b), Holt, C. J. said that the construction of the statute of distribution on the proximity of degrees must be according to the common law.

But the more modern cases seem to suppose that the said statute, being made in an ecclesiastical matter, shall be construed according to the rules of the civil law (c).

Upon which account the learned Dr. Harris observes (d), that the three first chapters of the 118th Novel of Justinian deserve the reader's attentive consideration, not only because they contain the latest policy of the civil law in regard to the disposition of intestates estates, but because they are the foundation of our statute law in this respect: and they are still (he says) almost of continual use, by being the general guide of the courts in England which hold cognizance of distributions in all those cases concerning which our own laws have been either silent or not sufficiently express.

And therefore it is judged requisite to insert the said three chapters here at length, and in the progress to observe what alterations have been made by the statute aforesaid, and by the other laws of this realm, and how far the said Novel with respect to this matter seemeth to be still a rule and direction.

CHAPTER THE FIRST.

Of the Succession of Descendents.

“ IF a person dieth intestate, leaving a descendent of either sex, or of whatsoever degree; such descendent is to be

118th Novel, Chapter I. Of Descendents.

(z) Blackst. Desc. 41, 42; [Bla. 594; *Thomas v. Kettericke*, 1 Ves. Com. 205.] sen. 333; *Lloyd v. Tench*, 2 Ves.

(a) 2 Roll. Abr. 303.

sen. 214; *Wallis v. Hodson*, 2 Atk.

(b) 12 Mod. 616; [S. C. 1 P. 177; *Lock v. Lake*, 2 Lee, 420.] Wms. 50.]

(d) Har. Justin. *ad finem*.

(c) [*Mentney v. Petty*, Pre. Cha.

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ents.

“ preferred to all ascendants and collaterals. And if any of
“ the descendents of the deceased should die, leaving sons or
“ daughters or other descendents, they shall succeed in the
“ place of their parent, and shall be intitled to the same share
“ of the intestate's estate, which their parent would have had
“ if such parent had lived. And this kind of succession is
“ termed a succession *in stirpes*; for in the succession of de-
“ scendants we allow no priority of degree, but admit the
“ grandchildren of any person by a deceased son or daughter
“ to be called to inherit that person together with his sons or
“ daughters, without making any distinction between males
“ and females, or the descendents of males and females.”

And what the civil law distributes in this manner amongst the children and other descendents, the statute clearly enough apportioneth amongst them, taking in together with them the wife of the deceased where there is a wife surviving. And herein the civil, canon, common, and statute laws do all agree, in giving this preference to descendents, exclusive of all ascendants and collaterals.

Grandchil-
dren take
per Capita.

Only with respect to *grandchildren*, these by the civil law, even when alone, although they descend from various stocks, and are unequal in their numbers, will take the estate of their deceased grandfather *per stirpes*, and not *per capita*; as suppose a man should die, leaving grandchildren by three different sons, already dead, to wit, three by one son, six by another, and twelve by another, each of these classes of grandchildren would take a third of the estate, without any regard to the inequality of the numbers in each class. But as to this point in England, the courts in which distributions are cognizable will order the division of an estate in such case to be made *per capita*; and this partly from a motive of equity, and partly from a consideration of the intent of the statute, which directs an equal and just distribution: and when the act mentions representation, it must be understood to refer to it in those cases only where representation is necessary to prevent exclusion, but not to refer to it in those cases where all the claimants are in equal degree, and therefore can take each in his own right (e).

Child unborn.

And if in the case of the succession of a father, who leaves behind him one or more children, his widow should happen to be big with child, the child in the mother's womb would be reckoned among the children of the deceased. And if the other children should proceed to a partition of the estate, it would be necessary to lay aside one share for the child that is to be born, and to name a curator to it, who may take care of its interest; unless they should think it more convenient to delay the partition unto the birth of the child, either by reason

(e) Harr. Just. *ad finem*.

of the uncertainty whether the child will be born alive or not, or because it may happen that there may be more children than one of this birth (*f*).

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tutes of Dis-
tribution.

But this provision is rendered more effectual by the statute aforesaid, which requires that no distribution shall be made till after the expiration of one year from the intestate's death, within which time such child or children will be born.

CHAPTER THE SECOND.

Of the Succession of Ascendents.

“ WHEN the deceased leaves no descendents, if a father or mother or other ascendent survive him, we decree that they shall be preferred to all collateral relations, except brothers or sisters, as shall be hereafter more particularly declared. And if divers ascendents are living, we prefer those who are in the nearest degree, whether they are male or female, paternal or maternal. And when several ascendents concur in the same degree, the inheritance of the deceased must be so divided that the ascendents on the part of the father may receive one-half, and the ascendents on the part of the mother the other half, without regard to the number of persons on either side. But if the deceased leaves brothers or sisters of the whole blood, together with ascendents, these collaterals of the deceased shall be called with the nearest ascendents; and although the surviving parents are a father and mother, the inheritance must be so divided, according to the number of persons, that each of the ascendents, and each of the brothers and sisters, may have an equal portion (*g*).”

118th Novel.
Chapter II.
Of Ascend-
ents.

If a Father or Mother.—By the law of England, when a child dieth intestate, leaving a *father*, the father is solely entitled to the whole personal estate of the intestate, exclusive of all others; and anciently, that is, in the reign of King Henry the First, a surviving *father* or *mother* could have taken even the real estate of their deceased child. But this law of succession was altered soon afterwards; for we find by Glanville that in the time of King Henry the Second, a father or mother could not have taken the real estate of their deceased children,

(*f*) 1 Stra. Dom. 624.

(*g*) This novel excludes the children of a deceased brother of the whole blood, when they concur with brothers and sisters and ascendents; but by Novel. 127, c. 1, they are admitted by representation to take the same share which their father would have taken had he lived. Both novels require whole blood only in brothers and sisters of the deceased and their children, when they concur with as-

cendents, or with a brother and sister of the whole blood; but not in any other degree: and therefore civilians admit brothers and sisters of the half blood to take equally, and an uncle of the half blood to concur with one of the whole, and prefer him to the son of an uncle of the whole blood. Vinnius ad Inst. 3, 5, 4; Huber. ib. de Suc. ab Intestato; Sande, Decis. lib. 4, def. 2.

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ents.

the inheritance being then carried over to the collateral line. And it hath ever since been held as an inviolable maxim, that an inheritance cannot ascend. But this alteration in the law made since the reign of King Henry the First, did not extend to personal estate; so that before the statute of the 1 Jac. 2, c. 17, if a child had died intestate, without a wife, child, or father, the *mother* would have been entitled to the whole personal estate; but by that statute every brother and sister, and their representatives, shall have an equal share with her (*h*).

[But by 3 & 4 Will. 4, c. 106, s. 6, it is enacted,

Lineal An-
cestor may be
Heir in pre-
ference to
collateral Per-
sons claiming
through him.

["That every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue."—ED.]

In the Eccle-
siastical Court
the next of
Kin, though
collateral,
is preferred
before one
more remote,
though lineal.

Or other Ascendent.—Here it is manifest by the civil law that ascendants, of whatever degree, shall be preferred before all collaterals, except in the case of brothers and sisters, as afore-said. But by Holt, Chief Justice, in the case of *Blackborough v. Davis*, it was holden that this is altered by the statute, which prefers the next of kin, though collateral, before one, though lineal, that is more remote (*i*).

Grandmother
preferred to
Aunt in Dis-
tribution.

In the said case of *Blackborough v. Davis*, E., 13 Will. 3 (*k*), administration being granted to the grandmother, the aunt moved for a mandamus to have it granted to her, urging that the first administration was void, she being nearer in degree. But by Holt, Chief Justice: In such case it is not void, but only voidable; and it is a matter properly contestible in the spiritual court. And if they are in equal degree, the spiritual court hath election. And the grandmother is as near as the aunt, because the descent to either would be a mediate descent, the medium of which is the father. But the court thought the advantage on the grandmother's side, in this respect, that she stands in the right line. Afterwards the aunt moved for a mandamus to have *distribution*, being in equal degree. On the contrary, it was argued that she was not entitled to it, being not so near as the grandmother; for the grandmother stands in the place of the mother, and is in the second degree to the intestate; the aunts are the daughters of the grandmother, and the daughters cannot be in equal degree with their mother.

(*h*) Harr. Just. *ibid.*; [*Ratcliffe's* 2 Ves. sen. 215.]
case, 3 Co. 40, a; *Collingwood v.* (*k*) 1 Salk. 38, 251; Prec. Cha.
Pain, 1 Ventr. 414.] 527; 12 Mod. 623; 1 P. Wms. 51;
(*i*) 1 P. Wms. 51; [*Lloyd v. Tench*, Ld. Raym. 684.]

And by Holt, Chief Justice: No mandamus ought to be in this case. And he said, as by the common law father and mother were nearer than brother and sister, so grandfather and grandmother are nearer than uncle and aunt. And the grandmother in this case is the root of the kindred, whereas the aunt is only a branch.

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tribution.

Of Ascend-
ents.

So in the case of *Woodroffe v. Wickworth*, in the Court of Chancery, T., 1719 (l), it was clearly agreed, that if one dies intestate, leaving a grandmother and uncles and aunts, the grandmother is entitled to the personal estate, in exclusion of the uncles and aunts.

If divers Ascendents are living, we prefer those who are in the nearest Degree, whether they are male or female, paternal or maternal.—And conformable hereunto are the words of the statute; and in such case the distribution shall be made amongst the next of kindred who are in equal degree. So in the case of *Moor v. Barkham*, May 13, 1723 (m), where the next of kindred to the intestate were a grandfather by the father's side, and a grandmother by the mother's side; it was decreed that they shall take in equal moieties, as being in equal degree; for though the grandfather by the father's side may in some respects be more worthy of blood, as in case of the descent of lands, yet in this respect dignity of blood is not material.

[But it is the practice of the ecclesiastical court to prefer a son to a daughter (n).—ED.]

And when several Ascendents concur in the same degree, the Inheritance of the Deceased must be so divided that the Ascendents on the part of the Father may receive one-half, and the Ascendents on the part of the Mother the other half, without regard to the number of Persons on either side.—By the custom of France (Mr. Domat tells us), in pursuance of the rule *paterna paternis, materna maternis*, the remotest ascendents are preferred to those that are nearer, with respect to the goods descended from their stock. And this, he says, seemeth to be more equitable and natural; and there seemeth even to be something of a hardship in the contrary rule (o).

And with us, in respect of the descent of lands, the rule holdeth, that lands which came by the father shall descend to the heirs on the part of the father; and the lands which came by the mother shall descend to the heirs on the part of the mother. But with respect to the distribution of personal estate, the statute requires an equal distribution amongst all such ascendents as are in equal degree.

If the Deceased leaves Brothers and Sisters, together with Ascendents, these Collaterals of the Deceased shall be called

According to
our Law, the
Brother is
preferred to
the Grand-
father.

(l) Prec. Cha. 527.

559.]

(m) 1 P. Wms. 53.

(o) 1 Strah. Dom. 639.

(n) [Chittenden v. Knight, 2 Lee,

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tion.

with the nearest Ascendents.—If it should here be asked, whether the brother of an intestate would exclude the grandfather by the civil law; the Novel appears at first sight to answer it very fully in the negative, by enacting, that if the deceased leaves brothers and sisters, together with ascendents in the right line, these collaterals shall be called with the nearest ascendents. And the generality of writers have understood this passage as admitting ascendents and brothers to take jointly. Yet a contrary interpretation hath been given by some civilians, and for this, amongst other reasons, that as a benefit is hereby intended to the brothers and sisters, this benefit to them would be so much the less, as the ascendents are farther distant from the person deceased, whereas on the contrary in reason it ought to be so much the more. As for example: suppose there are two brothers, and a father and mother, in this case each brother would receive a fourth part; but if there be no father or mother, it may happen that there shall be four grandfathers and grandmothers, and then each brother would have but a sixth part; so there may be eight great-grandfathers and great-grandmothers, in which case each brother would receive but a tenth part, and so on. But this question seems now to be settled in England, in consequence of three determinations; the first of which was given in the Exchequer, in the case of *Poole v. Wilshaw*, T., 1708; the second, in the case of *Norbury v. Vicars*, before Fortescue, Master of the Rolls, M., 1749; and the third was delivered by the Lord Chancellor Hardwicke, in the case of *Evelyn v. Evelyn*, H., 1754 (p).

Evelyn
v.
Evelyn.

Which case of *Evelyn v. Evelyn* was this.—By the Lord Chancellor Hardwicke: “This case is between the grandfather and the brother of the deceased. It is insisted on the behalf of the grandfather, that he is in equal degree of consanguinity with the brother of the deceased, and entitled to an equal share of his estate under the statute of distribution. The statute says that the ordinary (in case there shall be no wife, children, or children’s children) shall make a just and equal distribution among the next of kindred to the dead person in equal degree, or legally representing their stocks *pro suo cuique jure*, ‘according to the laws in such cases, and the rules and limitations hereafter set down.’ Which limitation is only a particular specification in what cases representation shall be allowed; and there is nothing more expressed in the statute, than that the estate shall be distributed equally to every the next of kin to the intestate, who are in equal degree.

“This point has been already twice determined in courts of equity. First, in the case of *Poole v. Wilshaw*, and afterwards in the case of *Norbury v. Vicars*.

“But it has been insisted on for the grandfather, that both

(p) Harr. Justin. *ibid*.

these decrees are erroneous; and that according to the computation of the civil law, the grandfather and brother are in equal degree, and consequently are equally entitled.

“ And I do agree, that in this case the computation of degrees ought to be according to the rules of the civil law; and that those of the common law are only to be regarded in matrimonial cases. Notwithstanding which I shall adhere to the determination of the case of *Poole v. Wilshaw*. I have seen the Lord Chief Baron Ward's, and Mr. Baron Price's reports of this case, and also that of Mr. Dodd (afterwards Chief Baron). The last of which, though but short, is the clearest of the three. It was a bill brought by the grandmother, for a share of her grandson's estate equally with his brother. And it was insisted on for her, that she was in equal degree of consanguinity, and equally entitled. But the reporter says, ‘ All the court contrary; and there has been no such usage since the making of the statute.’ And I know of none since; though it is eighty-three years since that statute was made. The subsequent decree at the Rolls was conformable to this. And therefore I shall not attempt to overthrow these determinations.

“ But if this was *res integra*, I think there are strong grounds both from the common and civil law, to prefer the brother to the grandfather. The words in the statute ‘ *pro sui cuique jure*, according to the laws in such cases,’ refer to certain precedent rules and methods of expounding the law.

“ The civil law is no part of the laws of England, any further than it has been received here in certain cases. In descent of lands there is but one degree between brother and brother. See Lord Chief Justice Hale's argument in the case of *Collingwood v. Pace* (q), who says, that according to the computation of degrees according to the laws of England, brother and brother make one degree. And the brother is distant from his brother and sister in the first degree of consanguinity. And he adds, that though the brother is by the civil law in the second degree from the brother, yet they say, in collaterals *nullus est proximior fratre, ideoque in collateralibus nullus est primus gradus, sed secundus obtinet vicem primi*. In the case of *Blackborough v. Davis* (r), the Lord Chief Justice Holt delivered the opinion of the court, and said that the laws of England, and not any foreign law, ought to govern in this case, and he cited the Saxon laws and others to the point then in question, which was concerning a personal estate.

“ What I have said would, I think, alone be sufficient to support the determination in the case of *Poole v. Wilshaw*; as it shows that the construction of the statute ought to be according to the law of England. But I further think, that according to the Roman law alone, there would be sufficient ground to

(q) 1 Ventr. 423.

(r) 1 P. Wms. 50.

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tion.

support the resolution. How the matter of succession of collaterals stood upon the law of the Twelve Tables, and what alteration it received by the constitution of the Emperor Claudius, and the *senatus-consultum Tertullianum* made in the time of the Emperor Antoninus Pius, the adopted son of Adrian, so as to let in the mother who was before excluded, may be seen at large in Vinnius's Commentary on the Institutes (*s*). By the text itself of the Institutes (*t*), it appears that the grandmother was not to take as well as the mother. The words are, '*Postea autem senatus-consulto Tertulliano, quod divi Adriani temporibus factum est, plenissime de tristi successione matris non etiam aviæ deferendum, cautum est.*' See Vinnius's comment on this passage, p. 543, who shows that it was in the time of Antoninus Pius. But Heineccius's Syntagma, lib. iii. tit. 3, examines all the arguments, and inclines to Justinian's opinion. By the Code (*u*), the sister is preferred with the grandmother or grandfather.

"But the whole has been altered by the Novels of Justinian. It has been said that the Novels were never received in the western empire. But this is not so in the generality in which it was laid down. For they have been received in all countries where the civil law has been received, as much as other parts of that law; which has never, since the declension of the western empire, been taken for the absolute rule of law in any nation. All the commentators of the civil law consider the Novels as part of the Roman law. They call them *jus novissimum*. Vinnius, in his Commentary on the Institutes (*x*), has a dissertation which he calls *Ratio succedendi ab intestato ex jure novissimo*. Now by the 118th Novel, the brothers are let in to take an equal share with the father and mother. It is true that Mr. Domat is of another opinion (*y*). But Voet maintains the former opinion with great clearness: '*Illud non satis expeditum est,*' &c. (*z*). In this passage Mr. Voet shows that the emperor in the above cited Novel has emphatically said, '*Fratres et sorores cum proximis gradu ascendentibus vocari;*' which mention of the *next in degree* would be entirely superfluous if it was not intended to denote those who are in the first ascending degree (*a*); since it is a certain rule of law,

(*s*) Lib. 3, tit. 2, par. 3.

(*t*) Lib. 3, tit. 3, par. 2.

(*u*) Lib. 6, tit. 58, l. 9.

(*x*) 4to. edition at Leyden, 1726, p. 554.

(*y*) Folio edition at Paris, 1713, vol. i. part 2, book 2, tit. 2, sect. 1, paragr. 7; or Strahan's Translation, 2d edit. p. 639.

(*z*) Hague edit. 1731, vol. i. book 38, tit. 17, paragr. 13, p. 587.

(*a*) But upon these words Huber

has observed, that those may be said to be "next in degree *whom none precede;*" from whence he argues that though the grandfather is excluded when the father and brothers concur, yet when the father is out of the way the grandfather becomes *next in degree*, and ought to succeed with the brothers. The truth is, that on this point civilians are divided. See *Hub. ad Inst. lib. 3, de Success. ab Intest. secundum Nov. 118, s. 9.*

that there is no representation in the ascending line. He afterwards shows what absurdities follow, by letting in remoter persons in the ascending line to share with the brothers; since the more remote they were, the more in number they might be, and consequently would carry away a great share from the brothers, as the estate is to be divided into as many portions as there are persons. He then argues from the words of the Novel, which says, that the brothers shall be called to succeed equally with the ascendants in the next degree. (See the critique on these words in Domat before cited)—‘*Si aut pater aut mater fuerint.*’ Whence it follows, that they are not to come in promiscuously with all ascendants, but ‘*Si pater aut mater fuerint.*’ And he gives some additional reasons to support his opinion. ‘*Si aut pater*’—these are the words of the Novel as cited by Voet; but in the Novel itself it is ‘*Si et pater*’ (εἰ καὶ πατήρ ἢ μήτηρ εἴησαν). Upon which Mr. Domat argues that the words *si et*, being translated from the Greek, signify *et si*. However Mr. Voet’s general reasoning may be preferred to Domat’s, it is not fair in him to alter the words of the Novel on purpose to favour his own interpretation, when he could not but know that a contrary one has been founded on the words as they stand in the Novel.

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tutes of Distri-
bution.

“The Lord Chief Justice Hale, in the place above cited (b), says, that the brother is the first degree in collaterals. And the text of the Institute (c) says, ‘*Superior quidem et inferior cognatio a primo gradu incipit; et ea quæ transverso numeratur, a secundo.*’

“Vinnius, who is a very acute commentator, in the *Ratio succedendi ex jure novissimo* above cited, has an argument to prove that the right of succeeding is not always according to the proximity of degrees; in which (d) are the words ‘*Concludo igitur fieri posse, ut aliqui, pari gradu constituti jure proximitatis, soli succedant, exclusis iis qui eodem gradu aut etiam propinquiores sunt, si illorum jus sit potius.*’ This shows that one person may be preferred to another in equal degree *si ejus jus sit potius.*

“In the present case, *Ipsa utilitas, justi prope mater et æqui*, inclines to the preferring the brother to the grandfather, since there is in young persons a natural *spes accrescendi*. This alone indeed would not be sufficient to ground a determination upon, but joined to other reasons, it has its weight. And since not only the reasons are on this side the question, but the determinations have been that way, and to overthrow them would tend to introduce inconveniences, as it might disturb distributions already made, which is an argument of the greatest weight in the law, I shall determine this point in favour of the brother, to the exclusion of the grandfather.”

(b) 1 Ventr. 423.

(c) Book iii., tit. 6th, pt. 1.

(d) P. 556.

CHAPTER THE THIRD.

Of the Succession of Collaterals.

118th Novel.
Chapter III.
Of Collaterals

“ IF a person leaves neither descendents nor ascendants at the time of his death, we first call his brothers and sisters of the whole blood, whom we have also called to inherit with the fathers of deceased persons. And when there are no brothers of the whole blood with the deceased, we call those who are either by the same father only, or by the same mother. And if the deceased leaves brothers, and also nephews by a deceased brother or sister, those nephews shall be called to succeed with their uncles and aunts of the whole blood to the deceased; but however numerous those nephews are, they shall be entitled only to that share which their parent would have taken if alive. From whence it follows, that if a man dies, and is survived by the children of a deceased brother of the whole blood, and also by brothers of the half blood, then his nephews (that is, the children of his brother by the whole blood) are to be preferred to their uncles and aunts; for although such nephews are themselves in the third degree, yet they are preferred, as their parent would have been, if living. And on the contrary, if a man dies, and is survived by a brother of the whole blood, and by children of a brother of the half blood deceased, these nephews are excluded, as their father would have been, if he had lived. But among collaterals, we allow the privilege of representation to the sons and daughters of brothers and sisters, and no farther; and we grant it only to brothers’ and sisters’ children, when they concur with their uncles or aunts, paternal or maternal; for when descendents are called to inherit, we by no means permit the children of a deceased brother or sister to share in the succession, although the father or mother was of the whole blood with the deceased brother. But we have so far allowed the right of representation to brothers’ and sisters’ children, that being only in the third degree, they are called to inherit with those who are in the second. And this is evident, because brothers’ and sisters’ children are preferred to the uncles and aunts of the deceased, paternal as well as maternal; although they are all in the third degree of cognation. But if a deceased person leaves neither brothers nor sisters, nor brothers’ nor sisters’ children, we then call all the other collaterals, according to the prerogative of their respective degrees, preferring the nearer to the more remote; and if several are found in the same degree, the inheritance must be divided according to the number of persons, and this manner of dividing an inheritance is called a division *in capita* (e).”

(e) Harr. Justin. *ibid.*

Of the whole Blood.—We must here observe in relation to the distinction between the whole blood and the half blood, that the law of England is different in this particular, according as the succession regards lands of inheritance, or personal estate. In the case of inheritances, the whole blood is always preferred, and the half blood is no blood inheritable by descent. In succession to personal estate, the law hath been more uncertain, inasmuch as the statute takes no notice of this distinction between the whole blood and the half blood, but directs the distribution to be made amongst the next of kindred in equal degree to the intestate. But being certain that brothers and sisters of the half blood are in the same degree with brothers and sisters of the whole blood, it hath been the general opinion that, according to the said statute, brothers and sisters of the half blood are entitled to an equal share of the intestate's estate with the brothers and sisters of the whole blood, although there are several precedents of judgments given, since the statute, allowing the half blood to have but an half share. But the law in this particular is now become fixed and certain, ever since the decree of the House of Lords in the case of *Watts v. Crooke* (*f*), upon an appeal from a decree in Chancery, which had been given in favour of the half blood, and which was affirmed by the House of Lords (*g*).

Construction of the Statutes of Distribution.

No Distinction as to Personal Property between Whole and Half Blood.

And this shall extend to a *posthumous* brother of the half blood. And Lord Hardwicke said he could not distinguish this from the case of a child *in ventre sa mere*. If indeed it were to go to children born at any distance of time so as to cause an inconvenience by suspending the distribution, or to cause a taking back again, it might be an objection; but that cannot happen, because the child must be *in rerum natura* at the death of the intestate brother whose estate is in question, but at the utmost it cannot be carried beyond the year in which a distribution is to be made (*h*).

If the Deceased leaves Brothers and also Nephews.—In the case of *Walsh v. Walsh*, M., 1695 (*i*), a man had three brothers; one of them died leaving three children, another died leaving two, and the third died leaving five children, after which he himself died intestate. It was resolved, that distribution should be *per capita*, and not *per stirpes*, and that all the children should have equal; because none of them take by way of representation, but all as next of kindred in equal degree.

Where there are Brothers' Children only.

And herewith the best civilians agree. “*Si soli sint fratrum filii, non parentes, non fratres, succedunt in capita* (*k*). For

Object of the Right of Representation.

(*f*) [Or, *Crook v. Watt*, 2 Vern. 124; S. C. Show. P. C. 108; Com. Dig. Adm. H.; Bac. Abr. tit. Exors. s. 2.]

(*g*) 1 Strah. Domat, 658.

(*h*) *Burnet v. Man*, Nov. 16th, 1748, Ves. 156.

(*i*) Prec. Cha. 54.

(*k*) Cujac. ad Nov. 118, et de Feud.

2, 11.

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of the Sta-
tutes of Dis-
tribution.

as Vinnius has observed in his *Selectæ Juris Quæstiones* (l), the right of representation is a fiction of law which is introduced in order that the proximity of the surviving brother or sister may not exclude their nephews or nieces. But in this case such a fiction is unnecessary, as all the claimants are in an equal degree of proximity to the deceased.

So in the case of *Janson v. Bury*, H., 1723 (m). Lord Chief Baron Bury had several brothers and sisters, some of the half and some of the whole blood, who all died in his lifetime, all leaving several children. And now upon a bill exhibited for the distribution of his estate, it was decreed by the whole Court of Exchequer that the distribution should be *per capita*, and not *per stirpes*, for now they do not take by representation, but as next of kin to the intestate. But if one of the brothers or sisters of the Chief Baron had survived him, the children of the rest must have taken only by representation, that is to say, *per stirpes*. And the case in this court, between *Wall* and *Theedham*, was cited, which was on June 28, 1711. Dr. Wall, the intestate, had two sisters; Susannah, of the half blood, who left Samuel; Elizabeth, of the whole blood, who left John, Mary, and Dorothy. Both the sisters died in the lifetime of Dr. Wall. His wife, as administratrix, preferred a bill for direction in the distribution, and the court decreed one moiety of the intestate's estate to the wife, and the other moiety to be divided into four parts, one part for the issue of Susannah, and three for the issue of Elizabeth. And no distinction was made between the whole and the half blood.

And so much for the 118th Novel of Justinian. We now proceed with the explanation of the other parts of the statute of distribution, and of the other statutes consequent thereupon (n).

22 & 23 Car. 2,
c. 10.

[By the 7th section of the 22 & 23 Car. 2, c. 10, it is enacted, that—]

No Repre-
sentatives
after Bro-
thers' and
Sisters' Chil-
dren.

No Representatives admitted among Collaterals, after Brothers' and Sisters' Children.—In the case of *Maw v. Harding*, T., 1691 (o), the question was, whether the words of the statute are to be intended of brothers and sisters to the intestate; or whether, when distribution falls out amongst brothers and sisters, though remote relations to the intestate, representation shall be admitted amongst them. And the court held, that the representation should be only between the brothers and sisters to the intestate.

In the case of *Pett v. Pett*, T., 1700 (p), the persons claiming distribution were a deceased brother's daughter, and

(l) Lib. ii. c. 30.

(m) Bunb. 159.

(n) [*Carter v. Crawley*, Sir T. Raym. 496; S. C. 1 Freem. 296; *Caldecott v. Smith*, 2 Show. 286;

Beeton v. Darking, 2 Vern. 168.]

(o) 2 Vern. 233.

(p) 1 P. Wms. 25; S. C. 1 Salk. 250.

the grandchildren of another deceased brother. And it was held by the court, that the deceased brother's daughter only was entitled; and that a deceased brother's or sister's grandchildren shall not come in with a deceased brother's or sister's children.

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tribution.

So in the case of *Bowers v. Littlewood*, M., 1719 (q): a man died intestate, leaving no wife or child, brother or sister, but his next of kin were an uncle by his mother's side, and a deceased aunt's child. The latter brought a bill against the uncle for a share of the intestate's estate. To which the defendant demurred; and the demurrer was allowed. And the lord chancellor said, that the case of *Pett v. Pett* was in point, and that what had been urged in regard to the hardship of the case was nothing; for so it may seem hard, that if an intestate leaves a deceased brother's only son, and ten children of a deceased half sister, the ten children shall take ten parts in eleven with the son of the deceased brother, and yet the law is so, because they all take *per capita*, and not by way of representation.

In case there be no Child, then to the next of Kindred in equal Degree.—In the case of *Durand v. Prestwood*, June 30, 1738 (r), the intestate left two aunts, and a nephew and a niece (children of a brother deceased). By the Lord Chancellor Hardwicke: The surplus must be divided into four parts equally amongst them, they being all in equal degree, and therefore the children do not take *per stirpem*, but *per capita*; but if the father of the nieces had been living, he would have taken the whole.

Where there
is no Child.

A difference is observable here between this provision of the statute of Charles II., according to the interpretation here put upon it, and the Novel of Justinian, which in the third chapter prefers brothers' and sisters' children, to the uncles and aunts of the deceased, by representation, for both descriptions of persons are in the third degree. Lord Hardwicke observed in *Stanley v. Stanley*, *infra*, that the statute of distributions is inaccurately penned; and in this case it seems to have overlooked the doctrine of representation in brothers' children, although that statute and the 1 Jac. 2, c. 17, admit of it where the children of a brother of the deceased concur with their uncles, in exclusion of the uncles and aunts of the deceased, and where they concur with the deceased's wife and mother.

That no such Distribution of the Goods of any Person dying Intestate be made till after one Year.—But the right to the distributive share vests immediately on the intestate's death. As in the case of *Grice v. Grice*, H., 1708 (s), where a person, entitled to a distributory share of an intestate's estate,

(q) 1 P. Wms. 594.

v. *Albert*, 2 Lee, 51.]

(r) 1 Atk. 455; [*S. P. Lloyd v.*

(s) 3 P. Wms. 49.

Tench, 2 Ves. sen. 213; *Buissieres*

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died within a year after the intestate, it was decreed, that although by the statute no distribution is to be made within a year, yet the share of the deceased person is an interest vested, transmissible to his executors or administrators; for in this sense the statute makes a will for the intestate, and it is as if a legacy was bequeathed, payable a year hence; which would plainly be an interest vested presently. Nay, where one died without wife or issue, and intestate, leaving a father, who also died before taking out administration, or altering the property of the estate; yet by the statute the right to the intestate's personal estate vested in the father, and consequently belonged to his executors or administrators, and not to the next of kin to the first intestate, who in this case happened to be a different person.

Husband's
Right to Ad-
ministration
under 29
Car. 2.

Husband may demand and have Administration.]—By this explanatory act of the 29 Car. 2, c. 3, the right of husbands is saved, of administering to their wives, rights, credits, and other personal estates.

In the case of *Cary v. Taylor*, M., 1693(t), the wife, entitled by the statute of distribution, died before any distribution was made, and the husband died soon after without taking administration to his wife. It was decreed, that the wife's share should go to the husband's administrator, and not to the administrator of the wife. *Vide supra*, "*Administration*."

Husband's
Right to ad-
minister.

Squib v. Wynne, M., 1718(u). A wife, entitled by the death of her sister, to a personal estate, consisting of things in action, died; her husband married again, and died intestate, without having taken administration to his first wife. The second wife took out administration to him, and also to the first wife, of the goods not administered by the husband. And it was decreed, that the first wife's share of her sister's personal estate should go to the administratrix of the husband. And the Lord Chancellor Cowper said, that the exception in the statute of the 29 Car. 2, doth not confine it to the life of the husband, or to the circumstance of his having reduced any part of the wife's personal estate into possession, but provides that no part of her estate shall be distributed among her relations after her.

Cart v. Reeves, M., 1718(x). A wife died possessed of things in action. The husband survived, and died without taking out letters of administration to his wife. After which the next of kin to the wife administered to her. And the Lord Chancellor Macclesfield held, that the wife's administrator was but a trustee for the executor of the husband. And he said, that this clause in the act was made in favour of the husband, and not to his prejudice; so that it was intended by the parliament, that the husband should be within the statute of distribution, so as to take the wife's things in action as to his

(t) 2 Vern. 302.

(u) 1 P. Wms. 378.

(x) Ibid. 381.

benefit, but should not be within the same as to his prejudice; for were the construction to be otherwise, the husband of the wife intestate would be in a worse case than the next of kin, though ever so remote, which was not the intent of the statute. And the reporter adds, that Mr. Vernon cited the case of *Lady Aiscough*, wherein he said, Lord Cowper's opinion was the same with the Lord Macclesfield's, that the wife's things in action did vest in the husband by the statute of distribution; so that since this resolution, the right of administration follows the right of the estate, and ought, in case of the husband's death after the wife, to be granted to the next of kin to the husband, in the same manner as it is granted to a residuary legatee (y).

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tribution.

For if a husband survive his wife, all interests vested in her belong to him; and although he dies without getting them in, or taking out administration to her, yet they belong to his representatives, and not to her's (z).

So in the case of *Humphreys v. Bullen*, T., 1737 (a), the wife had a legacy left her by her husband; and after married a second husband, and died. Her second husband took out administration to her, but died before he received the legacy. His next of kin took out administration to him, and received the legacy. Another person took out administration to the wife of the goods not administered, and brought a bill against the husband's administrator to repay the money. The question was, whether it belonged to the plaintiff in that right, or to the defendant as representative of the husband. The Lord Chancellor Hardwicke thought it so clear for the defendant, that he would not suffer it to be argued. He said, "This is a plain case, taking it as it stood on the old statutes of administration, for thereby the husband was entitled to administration if he survived his wife. And as it stood on these statutes, nobody could call him to an account for the effects, for the party was to administer for the good of the soul, but not to make a distribution. But by the 22 & 23 Car. 2, c. 10, administrators are liable to make distribution, one-third to the wife of the intestate, and so on. Yet upon the penning of that statute, though no notice was taken of the husband being administrator of his wife, it was held not to be within the act; for no person could be in equal degree to the wife with the husband, and so he was not subject to the statute of distribution. Which matter is explained by the 29 Car. 2, c. 3, s. 25, which says, the husband may demand administration of his deceased wife's personal estate, and recover and enjoy the same, as he might have done before that act, which was (before that act) as his own property. And if before the statute of distribution, the husband had died before he had called in the effects of his

Husband's
Right to ad-
minister.

(y) 1 P. Wms. 382.

(z) 2 Abr. Eq. Cas. 424.

(a) 2 Abr. Cas. Eq. 445; [*vide supra*, "Administration."]

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tribution.

wife, and any other person had taken out administration to the wife, he would have been a trustee for the husband. So in the case of *Cart v. Reeves*, in Lord Macclesfield's time, it was held that an administrator *de bonis non* of the wife was a trustee for the representative of the husband. Therefore, though in point of law the plaintiff may be representative of the wife, yet he is only a trustee for the next of kin to the husband; and then the plaintiff, by bringing this bill against the person for whom he is intrusted, has been guilty of a breach of trust; so his bill must be dismissed with costs."

When the
Mother shall
be entitled to
the whole.

Shall die intestate without Wife or Child, in the Lifetime of the Mother.—Before this statute of the 1 Jac. 2, c. 17, if one died without wife or child, his mother had all, and his sisters and brothers nothing; *as the father surviving hath all at this day*. And the reason of making this statute was, because the mother might marry, and carry all away to another husband (b).

But if there be no brother or sister, or representative of brother or sister, then it is out of the statute, and the mother shall have the whole, as she had before the making of it. As in the case of *Jackson v. Proudehome*, T., 2 Geo. 1 (c), the son died intestate without father, brother, or sister; his mother living. She makes her will, and therein makes an executor and residuary legatee; and dies within a week after her son, and without having taken administration to him. The brother of the mother takes out administration to the son, as his uncle and next friend. The mother's executor brings a bill against the uncle, who was the son's administrator, to have an account of the personal estate of the son in right of his testatrix, who was entitled to it by the statute of distribution. Lord Chancellor Cowper said, that the administrator of the son is only trustee for the next of kin to the intestate who are entitled to a distribution by the statute, and that in this case was the mother, the son dying without father, brother or sister; and it is an interest vested in the mother, though she died before administration taken out to the son, and shall go to her executor and residuary legatee. And decreed accordingly.

When the
Mothers shares
with Brothers
and Sisters,
and Wife.

Without Wife or Child.—*Keilway v. Keilway*, T., 12 Geo. 2 (d). R. Keilway died intestate, possessed of a considerable personal estate, and without issue, leaving a wife and several brothers and sisters, and his mother living. The wife, under the statute of Car. 2, takes a moiety, and a question arising upon the statute of Jac. 2, how the other moiety should be distributed, whether the mother should have the whole, or only a distributive share with the brothers and sisters, a bill was brought in order to have the opinion of the court. Upon

(b) *Blackborough v. Davis*, 1 Salk. 251; [S. C. 1 P. Wms. 49, by Lord Holt.]

(c) *Viner, Execut.* (Z. 12), 1.
(d) *Str.* 710.

hearing, the Lord Chancellor King was clearly of opinion, and decreed, that the mother should have no more than a share of the other moiety with the brothers and sisters of the intestate; for the intent of the statute was, to put the mother (who before stood upon the same footing with the father) in the same state and condition only with these collaterals; so that whenever she is entitled, they shall have an equal share with her.

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tribution.

Stanley v. Stanley, May 14th, 1739 (e). Hoby Stanley died intestate, leaving a wife and a mother living, and children of a brother deceased. These children, as representatives of their father, bring a bill to have one-half of the moiety of the intestate's estate, the wife being entitled to the other moiety, and the mother (as they insisted) to have only an equal share with them. It is true in this case there is a *wife* left; but the intent of the act was to put the intestate's brothers and sisters, and their representatives, in the same light and condition with the mother, so that whenever the mother was entitled, the brothers and sisters, and their representatives (*per stirpes*) were to have an equal share with her; and cited the case of *Keilway v. Keilway*, which is exactly the same with the present, except that in the present case the intestate had no brother or sister living at his death, which is not material, in regard that the children of the brother take by way of representation. For the mother, who claimed the whole moiety, it was insisted, that these statutes are to receive a favourable construction to exclude representatives in a remote degree in respect of collaterals; and the words in the statute of James are in the conjunctive, and require a brother or sister to be *in esse*, as well as representatives of brothers and sisters, to make a case within this statute. It has been determined, in the case of *Walsh v. Walsh*, that when the intestate leaves brothers' or sisters' children, and no brother or sister, such children take *per capita* as next of kin, and not by representation; and in the case of *Durant v. Prestwood*, that the construction of the statute was the same if a man died leaving aunts and nieces and no brother or sister, such aunts and nieces would all take *per capita*, and the nieces could not take *per stirpes*; and yet if the father of the nieces had been living, he would have taken the whole. And from thence it was argued, that as there was no brother or sister of the intestate living, if the plaintiffs in this case took any thing, it must be necessarily *per capita* and not by representation; that when brother's children take *per capita*, they must necessarily take as next of kin, because as they are not in equal degree with the intestate's mother, they could not otherwise take at all. And it was further argued, that if they were entitled by representation, it might be carried to the fourth or fifth generation, for there is nothing to restrain it in this act

If there be
no Father of
the Intestate
living, yet if
there be
Nephews,
Nieces and
a Wife, the
Mother shall
share with
them.

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tribution.

as there is in the statute of distribution, which would create great confusion and fractions in the estates of intestates. By the Lord Chancellor Hardwicke: "There are two questions in this case; first, whether the plaintiffs, who are children of the intestate's brother, shall share with the mother of the intestate, there being a *wife* of the said intestate? Secondly, supposing they may, notwithstanding that there is a wife, whether they can come in, in respect that there is no *brother or sister* of the intestate living? As to the first, it is directly within the case of *Keilway v. Keilway*, and I am satisfied with the reason of that case. It depends upon the construction of the proviso in the statute of James, which is very incorrectly penned, and so is the statute of distribution; and therefore a construction is to be made upon the second statute, according to the intent and meaning of the legislature. Upon the statute of distribution the descending line excluded all collaterals, and afterwards went to the next of kin, so that the father or mother would take all; therefore the subsequent statute intended that the mother should have a provision only equal with the brother or sister of the intestate. As to the second question, it is a new one; for the intestate has left no brother or sister for the mother to collate (*f*) or share equally with. The case of *Walsh v. Walsh* is grounded upon the statute of Charles. The words of that act do suppose that there must be some persons to take in their own right, and others in right of representation; but the statute of James is of a different kind, and lets in another person. Here is a mother takes an original share in her own right, and the brother's and sister's children take as if the brother and sister were living; for the word *and* immediately preceding the words *the representatives*, must be construed in the disjunctive. As to the objection that such representation might be carried to several generations, I think that consequence doth not follow; for the proviso in the statute of James is to be incorporated into the statute of Charles, which expressly says that representation shall not be carried beyond brothers' and sisters' children; and this is agreeable to the rule laid down by Lord Hale, that statutes made *pari materia* shall be construed into one another. *I think the statute of James intended to let in the rule of the civil law, which contained three lines, ascending, descending, and collateral; the descending line absolutely excluded all others; the ascending excluded all collaterals except brothers and sisters, and they took alike.*" His lordship therefore ordered the residue of the intestate's estate, after satisfaction of debts, to be divided into four equal parts, two-fourth parts thereof to go to the widow, one-fourth to the mother, and one-fourth to the brother's children.

Construction
of *and* in the
1 Jac. 2,
c. 17, s. 7.

(*f*) *Quære*, if not meant to concur with.

[In a late case, a widow having an only daughter by her deceased husband, married a second husband, and had two sons by the second marriage. Afterwards her daughter, the fruit of the first marriage, died intestate and unmarried; the question arose whether her mother was exclusively entitled to her daughter's personal estate, or whether the brothers of the half blood, her children by the second marriage, were entitled to share with her. The late Master of the Rolls, Sir J. Leach, held that by the statute of James they were so entitled (*g*).

Construction of the Statutes of Distribution.

Brothers and Sisters of the Half Blood share with the Mother.

[But the mother-in-law of an intestate, not being of his blood, can claim nothing under the statute of distributions (*h*). —ED.]

Mother-in-Law.

Every Brother and Sister.]—*Wallis v. Hodgson*, January 24th, 1740. James Wallis died intestate, and at his death left issue Towers Wallis, his only child, an infant, who died within a week after his father, and his wife then *enceinte* of a daughter. A bill was brought by the daughter for a moiety of the personal estate of Towers Wallis, he having died without wife or child in the lifetime of his mother. A cross bill was filed by the mother, praying that the whole personal estate of Towers Wallis might be decreed unto her. At the hearing of this cause, Lord Chancellor Hardwicke thought it was a matter of some difficulty, and directed it to stand over till he had consulted with the civilians upon it, and now delivered his opinion, that the daughter born after the death of her brother was entitled to a moiety of his personal estate: "This is a question which depends upon the statute of 1 Jac. 2, c. 17. If the sister had happened to have been born before the death of her brother, without doubt she would have been entitled to a share of her brother's personal estate equally with her mother. The only doubt is, inasmuch as she was a posthumous sister, and born after the death of her brother: but that circumstance, I am of opinion, will make no difference. It was admitted by the counsel for the defendant, that upon the statute of Charles the Second, a posthumous child shall have the benefit of a share of the personal estate of his father, equally with the other children; for this is agreeable to the intent of that statute, and to that debt of nature which parents owe to their children: nor can any inconvenience arise from this, because the event of there being such children must happen in nine months at farthest. But it was objected, that in collateral successions *ab intestato*, as between brothers and sisters, uncles and nephews, there is no such debt of nature: that the distributory share must vest in the party at the time of the death of the intestate, or not at all; and that great inconveniences must follow from a different determination; and that the vesting might be postponed and broken in upon, and varied by a

Wallis v. Hodgson.

Lord Hardwicke's Judgment that a posthumous Sister is entitled to a Share in her Intestate Brother's Property.

(*g*) [*Jessop v. Watson*, 1 M. & K. 665.]

(*h*) [*Rutland v. Rutland*, 2 P. Wms. 216.]

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subsequent event: and in order to specify an inconvenience of this sort that might happen, the case of the half blood has been put that they are equally entitled to a distributory share with the whole blood; that a mother might marry a second husband, and by that means there may be more brothers and sisters born at great distances of time, and therefore the distribution of the party's estate might perpetually vary. As to the first of these objections, that there is no debt of nature in collateral successions, that is a circumstance of no weight; in the case of lineal successions, where that objection has been made use of as an argument for giving a share to the posthumous child, that has been only an additional corroboratory reason, and the primary reason has been the intention of the statute to preserve the estate of the father among his own children. As to the second objection, that the estate must vest immediately upon the death of the intestate, it is true that this is generally laid down in 1 Vern. 403, and 2 Vern. 274, but this objection is of equal weight in the case of lineal successions *ab intestato* as it is in collateral successions, yet there it has never been allowed; and this appears by the opinion of Lord Raymond in *Edwards v. Freeman* (i). As to the third objection, that according to this doctrine a posthumous brother or sister of the half blood would be able to take, which would introduce many inconveniences, it is very true that on the statute of Charles the Second, the half blood shall take equally with the whole; for that was finally settled in Shower's Parliamentary Cases, 108, where all the learning on this head is collected together; but I do not find that it was ever determined on this statute of James the Second, that a brother of the half blood should take as representative of his brother deceased. In the case of *Watts v. Cawton*, this point was argued, and many probable reasons given for that side of the question; but there was no determination, and therefore I will leave this point unprejudiced till it shall arise. The principal reason upon which I found my opinion in the present case is, that the posthumous sister was *in ventre sa mere* at the death of her brother, and consequently was a person *in rerum natura*. Upon this ground it is, that by the rules of the common and civil law she is capable of taking in succession. By the rules of the common law, an enceinte of this kind may be vouched in a common recovery; and in behalf of such an enceinte, a bill may be brought, and an injunction granted to stay waste. So in the construction of wills and uses, an infant of this sort is capable of taking. For notwithstanding the case of *Slow v. Cutler*, it is now settled that such an infant is capable of taking by devise. And of this opinion were two judges in the case of *Scattergood v. Edge*, according

(i) 2 P. Wms. 446.

to a manuscript report which I have of that case. But though this is so at common law, every body knows that that which gave birth to the statute of Charles the Second was the contention then depending between the temporal and ecclesiastical courts in relation to the power which the spiritual courts then exercised of compelling distributions, and taking bonds for that purpose. The rise and progress of this dispute is mentioned in 3 Mod. 58 and Raym. 496. That statute hath ascertained that point in favour of the ecclesiastical courts; and the most material clauses in it are relative to their law, and to the course of proceedings in their courts: and the several expressions in the third section show that the main design of the act was (as hath been mentioned) to make the exercise of that jurisdiction in the ecclesiastical courts legal, which before that time was condemned in the temporal courts. And in the case of *Smith v. Tracy*, Lord Holt, who was then one of the counsel, argued strongly that that statute was not to be construed by the rules of the common but of the canon and civil law; and a consultation was thereupon awarded. In the case of *Carter v. Crawley* it was likewise held, that that statute was directory to the spiritual courts, and was grounded principally on their law and the practice of their courts. In a case at the Rolls, the Master of the Rolls was of opinion that the statute was to be construed according to the canon and civil law: and afterwards, upon an appeal, Lord King agreed to that opinion. This statute of Charles the Second therefore confirms the jurisdiction of the ecclesiastical courts which hath been mentioned, and enlarges it. It sets up the *collatio bonorum* which the civil law allows of. As this is so, the statute of James the Second must be construed by the civil and canon law likewise. In 1 Ventris, 244, Lord Hale was of opinion, that statutes made *in pari materia* were to be taken into the construction of one another, and that the statute of the 14 Eliz., relating to church leases, is a kind of an appendix to the 13 Eliz. relating to the same matter. And this rule of construction holds more strongly in the present case than it did in that; for this statute of James the Second is a continuance of that of Charles the Second, with three additional clauses; and therefore it is to be considered as if the statute of Charles the Second was repealed and re-enacted in it. And if this is so, it is considerable what the civil law is in this particular; and by that law an infant *in ventre sa mere* is considered as *in esse* in those respects which are for the benefit of the infant, though not in those which are to his prejudice. This appears by many passages in the Digest. In the present case the question is *de commodo ipsius partus* merely, and noways relates to the prejudice of this infant; therefore the decree must be accordingly."

2. *Of Customs in Particular Places.*

1. <i>Of London</i>	570	3. <i>Of Wales</i>	602
2. <i>Of York</i>	580		

[The 1 Vict. c. 26, s. 3, governing all wills made after Jan. 1, 1838, enacts, "That it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, &c. &c."—ED.]

By a clause in the statute of distribution, as hath been observed, these customs are specially reserved and excepted. What these customs are, particularly within the city of London and the province of York, which comprehend so large and considerable a part of the kingdom, it is somewhat strange that so few authors have taken any pains to inform their readers or themselves. The civil law acknowledgeth not these customs, nor yet doth the common law; and therefore perhaps neither civilians nor common lawyers have judged them a proper subject for their inquiries. And yet the general notion thereof seemeth to have sprung from the civil law, which establisheth what the civilians call the *legitime*, or legal portion, although much different from these customs: and these customs are so ancient, and of ancient times were of such general and almost universal extent, that some of the greatest lawyers have doubted whether they were not part of the common law.

The matter, in short, seemeth to have been plainly thus: Before the Conquest, lands were devisable by will, of which the gavelkind lands are a standing instance. And in more ancient times still, all the children, both male and female, inherited alike; and the estate, whether real or personal, descended to all equally (*k*). And this was agreeable to reason and nature, although not to the policy of government which succeeded. After the Conquest chiefly came in the military tenures with the feudal law. The eldest son was fittest to bear arms; and to the end that during the service he might be able to sustain the dignity of the military profession, he succeeded to the whole estate of land. And that the other children might not be destitute, a portion was provided for them out of the personalty, which the father might not give from them by will, nor the ordinary by distribution in case of intestacy.

All antiquity speaks of this as the general and established law, except only in some few boroughs and particular places, where the people lived probably by trade, and there was not lands sufficient for the support of arms. And this accounts for it why the lands holden in burgage tenure continued still devisable by will, when no other lands were so, except only

(*k*) 1 Salk. 251; Hale's H. C. L. 220; Dalrymp. Feud. 201, 202.

those of gavelkind in Kent and in divers parts of Wales, which received not the laws of the Conqueror.

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tutes of Dis-
tribution.

And this order continued during all those reigns, whilst the kings were supplied with soldiers by the lords of manors and others at a price and for a time agreed on. Until at last the kings and people coming into other measures for raising of soldiers, these military services dwindled away and were changed into pecuniary compensations. Lands in the reign of King Henry the Eighth became again devisable by will. The restraints upon the personalty vanished by degrees, and only some footsteps thereof remain in particular places. In the province of York these military services were the longer necessary, by reason of the continual incursions of the Scots (*l*); and to this day a great part of the lands within that province are not devisable by will; and until the reign of King William the Third, a man there by his will might not dispose of his personal estate from his wife and children further than his own proportionable part; and one would think by most if not all of the books which have been written upon the subject of wills that have taken any notice of this matter at all, that the same law continueth still, as indeed it doth in the case of intestacies, although not in the case of last wills and testaments. For by the statute of the 4 Will. 3, c. 2, power is given to the inhabitants of the province of York to dispose of their whole personal estate by will, notwithstanding their custom to the contrary, except only in the cities of York and of Chester; and

Statutes con-
firming Dis-
tribution by
Custom.

(*l*) In the county of Westmoreland there are many footsteps of this institution in the customs of the several manors. In the manor of Ravenstonedale, wherein the customs were ascertained by indenture betwixt the lord and tenants, in the 3rd and 4th of Phillip and Mary, one article is, that *the tenants should break or divide no farmholds*; or, as the same is explained by a further indenture in the 22nd year of Queen Elizabeth, that *none of the tenants shall divide or sever their ancient and customary tenements*, without special agreement with the lord or his steward for that purpose; which custom being riveted by the indentures, continues till this day, although the cause hath long since vanished. But, by permission of the lords from time to time, so many severances have been made, that it is difficult to estimate within the said manor what might have been the value of an original military tenement.

In the manor of Kentmire, in the said county, there are remains of an establishment which seem to lead nearer to that point. It appears that the manor was anciently divided into four quarters; each quarter into fifteen tenements; that each tenement consisted of a proportionable quantity of inclosed ground, with pasture for ten cattle in a common pasture lying within each quarter respectively, and privilege for eighty sheep in another pasture common to the whole manor; that for each tenement a man served the office of constable, paid 2s. a year to the curate of the chapel, and now pays 13s. 4d. rent to the lord of the manor. By which distinctions the tenements have been kept so far separate that it is easy to calculate what the soldier's estate within that manor might be supposed to be worth by the year; for one of those ancient tenements, well husbanded, seemeth to be of the value at this day of about 10*l*. a year.—Burn,

Construction
of the Sta-
tutes of Dis-
tribution.

by the 2 & 3 Ann. c. 5, the like power is given to the inhabitants of the city of York also. By the 7 & 8 Will. 3, c. 38, the like power is given to the inhabitants of the principality of Wales. And by the 11 Geo. 1, c. 18, the like power is given to the freemen of the city of London. But the law concerning the distribution of intestates' effects, in all the said places, continues as it was before.

Lord Coke's
Account.

Lord Chief Justice Coke, who might seem well able to give a good account of these customs, had a fair opportunity in his Commentary on the Great Charter, where the *reasonable part* is mentioned; but he passeth it over slightly, contrary to his wonted manner, and says drily that it is not by the common law, and quotes Bracton for the same.

That of the
Author of the
Law of Tes-
taments.

The author of the Law of Testaments (which seemeth to be a book not altogether destitute of merit) professeth expressly to treat the customs of the city of London and province of York; and he hath collected a considerable number of cases relating to that subject. But with regard to the city of London, by some fatality, he hath recited the statute of the 11 Geo. 1, c. 18, so imperfectly, that if he did understand it himself, it is impossible the reader should understand it from his manner of expressing it; but it is plain he did not understand it; for all which he delivers tendeth to prove that the custom of the city of London extends to wills as well as to the distribution of intestates' effects, and to wills especially. All which is in contradiction to the statute, as will appear. And of the statutes which give to the inhabitants of the province of York the like power to dispose of their whole personal estates by their last wills and testaments, he taketh not the least notice, nor ever mentions them.

Bishop Gib-
son's Account.

Dr. Gibson was a native of the province of York, and received his patrimony by the law and custom of that province. He recites the statutes faithfully which take away the custom as to wills within the province at large, and within the city of York in particular, and also within the principality of Wales; but when he comes to speak of the aforesaid *reasonable part*, having recited briefly the words of Bracton and Fleta, and just mentioned the writs *de rationabili parte bonorum* in the register, he says a bare reference thereto may be sufficient, since the said right is so far abolished; and he adds, that it is now little more than matter of speculation what we find in the *Magna Charta* itself concerning the same reasonable part. And when he comes to treat particularly of the distribution of intestates' effects, although the clause of exception of these customs in the statute of distribution seemed to render an explication thereof in some sort necessary, yet he passeth it in silence.

Dr. Swin-
burne's Ac-
count.

Dr. Swinburne was judge of the Prerogative Court of York. He had great abilities, and opportunities more than any other

person of his time, and inclination likewise, to obtain a competent satisfaction in this matter. His book, for the time in which it was written, is a most excellent book. And one can scarcely pardon the continuators of his work (although upon the whole of the better sort of this kind of authors) for attempting, as they pretend, to correct his style. It needeth no correction. Swinburne lived at a time, namely, in the latter end of Queen Elizabeth's reign, when the style of writing was elegant and easy, according to the true standard of the ancients and of nature, and utterly abhorrent from that formal bombast which (from the royal example) succeeded in the next reign. But if they could have amended Swinburne's expression, they ought not to have done it, but in an edition of Swinburne to have exhibited Swinburne; and where he might be judged to be wrong, or where the law since his time is altered (as it is in many cases), there was scope enough for animadversion other ways. But they have mangled Swinburne, and made no distinction betwixt what is his and what is not. By breaking the connection in improper places, and not always understanding him themselves, they have rendered even Swinburne sometimes unintelligible. All which is only intended as an apology, for having separated Swinburne throughout this title from his editors or continuators, by inserting what is Swinburne's, in his own words, and under his own name, and by distinguishing what is an addition to Swinburne, at the end of the quotation, by the letter *a*.

As to the matter before us, we must despair of obtaining a more perfect delineation of the custom of the province of York, as it was in Swinburne's days, than Swinburne hath exhibited. He was a diligent searcher into antiquity, was nearer to the fountain head than we are by almost two-hundred years, was acquainted personally with the most learned men of that time, and made it his employment to examine minutely into this particular custom, and above all, was master of the acts and records of the court of York, and availed himself of that treasure. But what is most astonishing is, that even in the very last edition of Swinburne, where he is treating of this same custom, there is no notice at all taken (by the editors) of the statutes or acts of parliament, which at one stroke utterly abolished at least one half of this custom; but for any thing which appears, the reader must judge that the inhabitants of the province of York cannot make their testaments of their personal estates further than to the extent of the testator's own rateable part, which was, and in the case of intestates is still called the *death's part*. Indeed there is a sketch of one of the said acts in a corner of the book elsewhere, inserted where it hath no manner of connexion, by those who did not understand, or did not consider, its importance and use.

Construction
of the Statutes
of Distribu-
tion.

How far
traceable by
the Civil
Law.

There is some shadow of this custom, as was said before, in the civil law, and the proportions were thus :—If there were four children or under, they had a third part equally amongst them ; if five or more, they had a moiety. And the civil law allows a legitime to parents, but not to widows ; whereas, on the contrary, the customs we speak of do allow a legal portion to widows, but not to parents (*m*).

By the statute of Magna Charta, c. 18, in the ninth year of King Henry the Third, it is said, generally, “If nothing be owing to the king or any other, all the chattels shall go to the use of the dead,” (that is, to his executors or administrators), “saving to his wife and children their reasonable parts,” [or, rather, their “proportionable” parts, “*salvis uxori ejus et pueris ipsius rationabilibus partibus suis.*”]

Bracton's
Account.

Bracton, who wrote soon after this statute, delivers it in few words as the general law of the realm, that after debts and other necessary charges deducted, the whole residue shall be divided into three parts ; of which the children, if there be any, shall have one part ; the wife, if she survive, shall have another part ; and the third part the testator shall have free power to dispose of. If the testator hath no children, then one moiety shall be to the deceased, and the other moiety shall be reserved to the wife. If he shall die, leaving no wife, and having children surviving, then the deceased shall have one moiety, and the children shall have the other. If he shall die without either wife or child, then the whole shall remain to the deceased (*n*). And it is to be observed that these proportions generally do govern the customs to this day.

And the same is delivered by the author of Fleta, almost in the same words, and he saith, as Bracton had said before, that this is the law, unless there be a custom to the contrary, as in cities, towns, and villages (*o*).

Constitution
of Archbishop
Stratford.

By a constitution of Archbishop Stratford, which was in the 16 Edw. 3, it is ordered thus, “Forasmuch as it happeneth sometimes, that persons dying intestate, the lords of the fees do not permit the debts of the deceased to be paid out of their moveable goods, nor the said goods to be distributed to the use of their wives, children or parents, or otherwise by the disposition of the ordinaries, according to that portion which by the custom of the country appertaineth to the deceased, we do decree, that none shall henceforth do the same, on pain of the greater excommunication (*p*).”

According to that Portion which by the custom of the Country appertaineth to the Deceased.]—Lindwood says, the portion of the deceased was what was assigned by the ordinary for the supposed benefit of the soul of the deceased, which was to

(*m*) 2 Domat, 119, 121.

(*n*) Bract. 60, 61.

(*o*) Fleta, b. ii. c. 57.

(*p*) Lind. 171.

be determined by custom; sometimes (says he) it was the whole personal estate, as when there was neither wife nor child; sometimes one half, as where there is a wife surviving, but no children; sometimes a third part, as where there is both wife and children (*q*).

Construction
of the Statutes
of Distribu-
tion.

By the Custom of the Country.]—He doth not say, of the realm, and that for this reason (saith Lindwood) because perhaps throughout the whole realm one and the same custom as to this matter doth not prevail; but there are different customs according to the diversities of countries; for there may be a general custom of some province, also a special custom of some city, territory, or place (*r*).

Fitzherbert saith (*s*), the writ *de rationabili parte bonorum* lieth, where the wife or sons and daughters of the deceased cannot have their *reasonable part* of the deceased's goods after the debts are paid and funeral expenses satisfied.

Fitzherbert's
Account.

And it seemeth, he says (*t*), by the statute of Magna Charta, c. 18, that this was the common law of the realm, and so, he says, it appeareth by Glanvil.

And in the 31 Edw. 3, a woman did demand the moiety of her husband's goods because he had no children, and counted upon the custom of the realm (*u*).

But in after times, and by degrees, they came to count for the same upon the particular custom of such and such places (*x*).

And accordingly the writs in the register do rehearse the customs of particular counties, and are of this form:—

"The king to the sheriff, &c. If *W.* who was the wife of *D.*, shall make us secure, &c., that then you summon *E.* and *E.*, executors of the testament of the aforesaid *D.*, that they be, &c. to show why, seeing that according to the custom in the county aforesaid hitherto obtained, wives after the death of their husbands ought to have their reasonable part of the goods and chattels of their husbands, they the same executors aforesaid, from her the said *W.* her reasonable part to the value of ten marks of the goods and chattels which were of the aforesaid *D.*, heretofore her husband, they do detain unjustly, and refuse to render them unto her, to the great damage and grievance of her the said *W.* and against the custom aforesaid. And have you there the summons and this writ, &c."

"The king, &c. Forasmuch as *B.* of —, and *S.*, his sister, have made us secure, &c., that you summon *E.* and *E.* executors of the testament of *D.* of —, that they be, &c. to show why, seeing that according to the custom in the county aforesaid hitherto obtained and approved, children after the death of their fathers, who are not their heirs, nor were promoted in the life of their fathers, ought to have their reasonable parts of their goods and chattels which were of their fathers; they the same executors aforesaid, from the aforesaid *B.* and *S.* after the death of the

(*q*) Lind. 178.

(*r*) Lind. 172.

(*s*) F. N. B. 284.

(*t*) F. N. B. 284.

(*u*) Ibid.

(*x*) Ibid.

Construction
of the Statutes
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tion.

aforesaid D. their father, whose heirs they are not, and who were not promoted in the life of the same their father, their reasonable parts to the value of ten pounds of the goods and chattels which were of the aforesaid D. their father, they do detain, unjustly, and refuse to render the same unto them, to the great damage and grievance of them the said B. and S., and against the custom aforesaid. And have you there the summons and this writ, &c."

In the case of *Stapleton v. Sherrard* (y), H., 1684, it was said, that the custom of the province of York is the same with the custom of the city of London, unless in the case where the eldest son hath lands by descent; but it will appear, when we come to treat of them separately, that there are other differences.

And first of the custom of the city of London.

1. *Of the Custom of the City of London in particular.*

Statute ena-
bling to dis-
pose by Will.

By the 11 Geo. 1, c. 18, s. 17, "Whereas great numbers of wealthy persons, not free of the city of London, do inhabit and carry on the trade of merchandize and other employments within the said city, and refuse or decline to become freemen of the same, by reason of an ancient custom within the said city, restraining the citizens and *freemen* of the same from disposing of their personal estates by their last wills and testaments; to the intent therefore that persons of wealth and ability, who exercise the business of merchandize and other laudable employments within the said city, may not be discouraged from becoming free of the same by reason of the said custom, it is enacted, that it shall be lawful to all persons who shall after June 1, 1725, be made free, or become free of the said city, and also for all persons who are already free, and on the said 1st day of June, 1725, shall be unmarried, and not have issue by any former marriage (z), to give and devise, will and dispose of their personal estates to such uses as they shall think fit, any custom or usage in the said city, or any by-law or ordinance made or observed within the same, to the contrary thereof in any wise notwithstanding."

Sect. 18. "Provided that in case any person, who shall at any time after the said first day of June, 1725, become free of the said city; and any person who is already free, and on the said first day of June, 1725, shall be unmarried, and not have issue by any former marriage,—hath agreed or shall agree by any writing under his hand, upon or in consideration of his marriage or otherwise, that his personal estate shall be subject to or be distributed or distributable according to the custom of the city of London; or in case any person so free or becoming free as aforesaid, shall die intestate: in every such case, the personal estate of such person so making such agreement, or so dying intestate, shall be subject to, and be distributed

(y) 1 Vern. 305.

(z) *Dansen v. Hawes*, Amb. 276.

and distributable according to the custom of the said city; any thing herein contained to the contrary notwithstanding.”

Construction
of the Sta-
tutes of Dis-
tribution.

So that as to intestates the custom continueth as it was before: which seemeth to be as follows:—

If a freeman of London dies, in London or elsewhere, leaving *a widow and a child or children*; his personal estate (after his debts paid, and the customary allowance for the funeral, and for the widow's chamber, being first deducted thereout) is by the custom of the said city to be divided into three equal parts, and disposed of in the following manner; to wit, one-third part thereof to the widow, another third part to the children, and the other third part (being taken out of the custom) is now made subject to the statute of distribution; and so dividing the whole into nine parts, four-ninths belong to the wife, and five-ninths to the children (*a*). Note, in the case of *Biddle v. Biddle*, 18 March, 1718 (*b*), before Lord Parker, it was said, that the widow is entitled to the furniture of her chamber; or in case the estate exceeds 2000*l.*, then to 50*l.* instead thereof.

Custom of
Distribution
in case of
Intestacy.

If a freeman *hath no wife, but hath children*; the half of his personal estate belongs to his children, and the other half (being the dead man's part) is in like manner distributable by the statute (*c*).

So if *he hath a wife, and no children*; half of his personal estate belongs to his wife, and the other half is distributable; and in this case one moiety of the dead man's part distributable by the statute as aforesaid, belongeth unto the wife by the said statute; so that in the whole she will have three-fourths of the personal estate, besides her widow's chamber (*d*).

If he hath *neither wife nor child* at the time of his death, then the whole belongs to the deceased, and is distributable by the statute (*e*).

Concerning which death's part, to be distributed by the statute, it is enacted, by the 1 Jac. 2, c. 17, s. 8, as followeth: “For the determining some doubts arising on the statute of frauds and perjuries, it is enacted and declared, that the clause therein, whereby it is provided that that act or any thing therein contained should not any ways prejudice or hinder the customs observed within the city of London and province of York, was never intended nor shall be taken or construed to extend to such part of any intestate's estate, as any administrator, by virtue only of being administrator, by pretence or reason of any custom, may claim to have to exempt the same from distribution; but that such part in the hands of such administra-

The Death's
Part distribu-
table accord-
ing to the
Statute of
Distribution.

(*a*) 2 Salk. 426; Ld. Raym. 1328;
1 Vern. 180.

(*b*) Vin. tit. Customs of London,
B. 2.

(*c*) 1 P. Wms. 341.

(*d*) 2 Salk. 246; Law of Test. 211.

(*e*) Law of Test. 192.

Construction
of the Sta-
tutes of Dis-
tribution.

tor shall be subject to distribution, as in other cases within the said act."

It was called the dead man's part, because the ordinary, or he to whom the ordinary should commit administration, was to dispose of the same to pious uses for the benefit of the soul of the deceased; but administrators, under pretence of concealed debts, did frequently keep the greatest part thereof to their own use. And after this statute of the 1 Jac. 2, in the case between the widow and the son of Sir Richard How, Knight, the widow as administratrix claimed to herself the death's part by virtue of the letters of administration granted to her of her husband's estate; but this, being thought unreasonable, was contested by the son in chancery with his mother-in-law; and upon hearing the cause, it was settled and decreed to be observed for ever, that the deceased's part should be divided according to the statute of distribution, in pursuance of this explanatory clause of the 1 Jac. 2, c. 17 (*f*).

Superinten-
dency of the
Court of
Orphans.

The Court of Orphans is held by custom time out of memory before the lord mayor and aldermen of the city of London, who are guardians to the children of all freemen of London that are under the age of twenty-one years at the time of their father's decease (*g*).

And if a freeman or freewoman die, leaving orphans within age unmarried, the Court of Orphans shall have the custody of their body and goods; and the executors or administrators shall exhibit inventories before them, and become bound to the chamberlain to the use of the orphans to make a true account upon oath, and if they refuse, shall commit them till they become bound (*h*). And their being bound so to do in the spiritual court excuseth them not from this custom (*i*).

For if the father is a freeman of London, he cannot devise the disposition of the body of his child; and if he do, yet the infant shall remain in the custody of the mayor and aldermen (*k*).

Children enti-
tled, though
born out of
the City.

The children of a freeman of London are entitled to the share of his personal estate, though they were born out of the city, and though their father did not inhabit or die in London (*l*).

And also, though their estate doth not lie in the city, but elsewhere (*m*).

Child entitled
though born
after the Fa-
ther's Death.

Walsam v. Skinner, T., 1718 (*n*). An after-born child shall come in with the rest for a customary share of the father's personal estate.

Child dying,
the Orphan-
age Part
survives.

Wilcocks v. Wilcocks, T., 1706 (*o*). A child entitled to an

(*f*) Green's Privil. 49, 50.

(*g*) Privilegia Londini, 288.

(*h*) Ibid. 280.

(*i*) Law of Ex. 252.

(*k*) Privil. Lond. 287.

(*l*) Law of Test. 202.

(*m*) Privil. Lond. 288.

(*n*) Prec. Cha. 499.

(*o*) 2 Vern. 559.

orphanage share of his father's personal estate, dying under twenty-one, and unmarried, cannot devise it by his will, for by the custom it survives to the other children; but he may devise the share which he hath under the statute of distribution.

Construction
of the Sta-
tutes of Dis-
tribution.

In the case of *Fouke v. Lewen*, M., 1682, it is said that if a man marries an orphan, who dies under twenty-one, her orphanage part shall not survive to the other children, but shall go to the husband.

But in the case of *Merriweather v. Hester*, T., 5 Geo. 1 (p), a case was cited between *Ambrose* and *Ambrose*, and another between *Rawlinson* and *Rawlinson*, where it had been certified to be the custom of London, and was accordingly decreed by the Lord Chancellors Harcourt and Cowper successively, that if a city orphan dies before twenty-one, his orphanage part survives to the other orphans, and that he can make no disposition by will to contradict it; but if he dies after twenty-one, at which time he might by will have disposed of it, there, though he die intestate, it shall go according to the statute of distribution, between his mother and surviving brothers and sisters; and that in the other case, where he dies before twenty-one, the survivorship holds only as to the orphanage part belonging to himself, so that if he had by survivorship the part of any other of his brothers or sisters, that should go according to the statute of distribution. It was also said, that if a man marries an orphan, yet till twenty-one his right is not so vested as to prevent his wife's share from surviving in case she died before twenty-one.

So if a man marries an orphan, and dies, his representatives are not entitled to any part of what was his wife's customary share, but the whole belongs to the wife (q).

A wife divorced for adultery shall not have her customary share (r).

Wife di-
vorced.

Newsome v. Bowyer, T., 1729 (s). Where the husband was attainted of felony, and pardoned on condition of transportation, and afterwards the wife became entitled to some personal estate as orphan to a freeman of London, this personal estate was decreed to belong to the wife, as to a *feme sole*.

Husband at-
tainted.

If a freeman having several children, or but one child, doth fully advance all his children or his single child, this satisfies the custom, and is the same as if he had no child, and his personal estate shall go as if there was none. So if a freeman compound with his wife before marriage for her customary part, it is the same as if there was no wife (t).

Hancock v. Hancock, M., 1710 (u). Where the wife of a

(p) Prec. Cha. 537.

(q) Vin. Custom of London (B. 10), 18; [*vide supra*, "Payment of Legacies," 383.]

(r) [*Pettifer v. James*, Bunb. 16; *In the goods of Davies*, 2 Curt. 608.]

(s) 3 P. Wms. 32.

(t) 2 P. Wms. 527.

(u) 2 Vern. 665.

Construction
of the Sta-
tutes of Dis-
tribution.

freeman of London is compounded with before marriage, by settling a jointure, although of land, the wife is taken as advanced, and the children by the custom of London shall have a moiety as if the wife was dead. So if all the children are advanced, the wife shall have a moiety.

Babington v. Greenwood, H., 1718 (x). A jointure by a freeman on his wife in bar of dower, will not bar her of her customary part; otherwise it is, if said to be in bar of her customary part.

Lewin v. Lewin, M., 1727 (y). If a woman before marriage with a freeman of London accepts of a settlement upon her to take effect after her husband's death in case she survives him, of part of his personal estate, (without taking notice of the custom of London,) she is thereby barred of her customary part of his personal estate.

Pusey v. Deshoverie, T., 1734 (z). Lord Chancellor Talbot, taking notice of the contrary determinations made by the court in this point, said, it had been of late settled, that where a wife was compounded withal, it should be taken as if there was no wife; and consequently that the husband should have one moiety, and the children the other. The like was held by the Lord Chancellor Hardwicke in the case of *Morris v. Burrow*, in the year 1737.

What shall be
deemed a suf-
ficient Ad-
vancement.

It is said generally by the author of the Law of Testaments, that any provision made by the father in his lifetime for his children, is advancement within the custom; but a settlement of a real estate on a child is no advancement, nor to be brought into hotchpot (a).

But Mr. Vernon questioneth whether every provision made by the father for his child be an advancement, or whether only such a provision as is made on the marriage of a child? And he answers, that it seemeth to be only such a provision as is made on marriage, or in pursuance of a marriage agreement (b).

And in the case of *Jenks v. Holford*, M., 34 Car. 2 (c), the plaintiff exhibited his bill, setting forth that his wife's father was a citizen of London, and that he had not advanced her in his lifetime, and demanded her customary part, and prayed an account. It was insisted, on the defendant's part, that the plaintiff's wife was advanced by her father in his lifetime, he having given her 400*l*. But the Lord Chancellor was of opinion that it could not be any advancement, unless it had been given her as a marriage portion, or in pursuance of a marriage agreement; and the 400*l*. were not given till a long time after her marriage, and without any agreement that the same should be for her marriage portion, and was a free gift, great part of

(x) 1 P. Wms. 530.

(y) 3 P. Wms. 16.

(z) 1 P. Wms. 644.

(a) Law of Test. 204.

(b) 1 Vern. 89.

(c) 1 Vern. 61.

the sums that made up the 400*l.* being given at christenings and lyings-in. Next, it was insisted for the defendant, that these several sums, howsoever given, ought (if the plaintiff will come in for his wife's customary part) to be cast into hotchpot. But the plaintiff's counsel denied it, and took a difference betwixt a free gift subsequent to the marriage, and where the same is given in marriage; and compared it to the case of an heiress, where she has lands given her in frank marriage, those must be cast into hotchpot; but otherwise it is of lands conveyed or given to her by her father or other ancestor after the marriage. But not allowed by the Lord Chancellor. And the plaintiff not consenting to cast into hotchpot the 400*l.* given unto his wife as aforesaid, the bill was dismissed.

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of the Sta-
tutes of Dis-
tribution.

Civil v. Rich, H., 1683 (*d*). The custom of the city of London touching orphans was certified to be, that where an heir or co-heir had a *real estate* settled on him or her by the father, the same was out of the custom of the city of London; and though the father should afterwards declare the same to be a full advancement for such child, yet that was no bar to his orphanage part, neither was it to be brought into hotchpot, but was clearly out of the custom. And it was said, that by the custom of the city of London, where a child is married with the father's consent, and there is a portion given in marriage, such child is debarred from claiming any benefit of the orphanage part, unless the father shall, by writing under his hand and seal, not only declare that such child was not fully advanced, but likewise mention in certain how much the portion given in marriage did amount unto; that so it may appear what sum is to be brought into hotchpot.

Annand v. Honeywood, M., 1685 (*e*). The question was, whether *money* given by the father *to be laid out in land* to be settled on the son and the intended wife for their lives, with remainders in tail, should be reckoned to be an advancement by part of the personal estate of the father, so as that the son ought to bring the same into hotchpot, to entitle him to a share of the personal estate. Lord Chancellor: There is no colour to reckon this any part of the personal estate.

Chace v. Box, T., 1699 (*f*). If any freeman's child be married in the lifetime of his or her father, by his consent, and not fully advanced to his full part or portion of his father's personal or customary estate as he shall be worth at the time of his decease, such freeman's child so married as aforesaid shall be excluded and debarred from having any further part or portion of his or her said father's personal or customary estate to be had at the time of his decease; except such father, by some writing by him written and signed with his name or mark, shall

(*d*) 1 Vern. 216.

(*e*) 1 Vern. 345.

(*f*) Ld. Raym. 484.

Construction
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declare and express the value of such advancement. And then every such child, after the decease of his father, producing such writing, and bringing such portion so had of his father into hotchpot, shall have as much as will make up the same a full child's part or portion of the customary estate which his father had at the time of his decease; notwithstanding such father shall by any writing under his hand and seal declare such child was by him fully advanced.

Note, it is said to be sufficient if he declare the same by *any* writing under his hand, or by any thing written by him, although it be in an almanack or elsewhere (*g*).

Dean v. Lord Delaware, H., 1708 (*h*). The father's declaring that the child was fully advanced or not advanced, was of no avail, unless it appeared what the advancement was in certainty; to the intent it might be known whether such advancement did amount unto as much as would have belonged to the child by the custom.

Cleaver v. Spurling, T., 1729 (*i*). If a freeman hath advanced his child on marriage, and the certainty of that advancement doth not appear under the freeman's hand, this is to be taken as a full advancement; but the freeman's declaration alone that he hath *fully advanced* his child, is not of itself sufficient; for at that rate it would be in the power of every freeman, by making such declaration, to bar his child of the orphanage part.

Farnham v. Phillips (*k*). A freeman of London made his will, and divided his estate according to the custom, and the dead man's part he devised amongst his wife and children. Afterwards in his lifetime he married one of his daughters, and gave her 1000*l.*, which in the marriage articles was called her portion or provision. This the court declared to be a satisfaction of her orphanage share, but not to exclude her from a share of the residue, which at the time of making the will was uncertain.

Child of Age
may release
the Custom-
ary Part.

The child of a freeman of London, when of age, may, in consideration of a present fortune, bar herself of her customary part. As in the case of *Lockyer v. Savage*, M., 6 Geo. 2 (*l*). The father, on his daughter's marriage, agrees to give her 3000*l.*, which she, being of age, covenants to receive in full of her customary share as a freeman's daughter. And though it was objected that such a future right cannot be released, and that parents might make an ill use of the power they have over their children, in forcing them to give such discharges, yet this was held a good bar of the custom, there being no fraud in the transaction.

(*g*) Green's Privil. of Lond. 53.

(*h*) 2 Vern. 630.

(*i*) 2 P. Wms. 527.

(*k*) 2 Atk. 214, 523.

(*l*) 2 Abr. Cas. Eq. 272; Stra.
947.

But such release, without a valuable consideration, is not good; for in such case, at the time of the release, the children having neither *jus in re*, nor *jus ad rem*, the whole being in the father during his life, there is nothing for any release to operate upon (*m*).

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tribution.

In the case of *Kemp v. Kelsey*, M., 1720 (*n*): The plaintiff's wife was a freeman's daughter; and after her marriage her father gave her 100*l.*, and the plaintiff executed a release for the 100*l.* in full of all his wife's customary part or share which was or might be due to her by the custom of London. The father died. A bill was brought for a discovery of the personal estate, and that upon the plaintiff's bringing the 100*l.* into hotchpot, they might be let into a customary part of the father's estate. The defendant pleaded the release in bar. And by the Lord Chancellor Macclesfield: The husband had no power to release a future interest of his wife's. She might survive him, and would then be entitled to it in her own right. Besides, this release is suggested to be fraudulently obtained. And therefore his Lordship ordered the plea to stand for an answer, with liberty to except, so as to have an account of the freeman's personal estate, and the benefit of the release to be saved to the hearing, when the question would come more properly, whether the release by the custom was good or not.

Whether the
Husband can
release.

Cox v. Belitha, E., 1725 (*o*). A freeman of London had two daughters and one son. One of the daughters married; and on receiving a suitable portion, the husband released all right and interest which he had or might have to any part of the father's personal estate by the custom or otherwise; and covenanted that at any time after the death of the father he would do any further act for the releasing of any right which he might have by the custom. Jekyll and Gilbert, commissioners, inclined to think that the release being for a valuable consideration, purporting an agreement to quit the right to the orphanage part, to be binding in equity; but though this might not be so clear, yet the covenant for a valuable consideration to release the future right is good. And so they decreed on the execution of the release.

Medcalfe v. Ives, June 18, 1737 (*p*). A bill was brought to have a specific performance of articles made on the marriage of the defendant, whereby the defendant and his wife covenanted, in consideration of 2000*l.*, the wife's marriage portion, to release all the right and interest that might accrue to them out of her father's personal estate by the custom of the city of London, he being a freeman of the said city. The defence made for the defendant was, that the customary part being a mere possibility and contingency, which might or might not

(*m*) 1 Atk. 402.

(*o*) 2 P. Wms. 272.

(*n*) 2 Abr. Eq. Cas. 267.

(*p*) 1 Atk. 63.

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happen, it could not be released; and if it could, that at the time of the articles the wife was an infant, and so not bound by them; besides, that the 2000*l.* was no consideration for releasing such an interest, the wife's father having died worth upwards of 20,000*l.* By the Lord Chancellor Hardwicke: Though hardships may happen on my determination, yet these are considerations too loose either for a judge at law or in this court to lay any weight upon; and I must determine according to the facts, by the rules of law and of this court. In this case there appears to have been a valuable consideration for the agreement in the articles, because at the time when the 2000*l.* was given, the defendant's wife was entitled to no part of the estate of her father, and it was given for her advancement in the world; and it is highly reasonable that such kind of articles should be carried into execution; and that when a father is bountiful to his children in his lifetime, he should have his affairs settled to his own satisfaction. As to the objection of the customary part being a possibility, and merely in contingency, it is of no weight; for there is no doubt but it might be released in equity: but here is a covenant, which the defendant is bound by in all events. And it is no objection to say that the wife was under age; for though in this respect if the husband were dead, the articles would not bind her, and she would by survivorship be entitled to the customary share, as a chose in action not recovered or received by the husband; yet, he being alive, it is a matter that accrues to him in right of his wife; and he may release it, and his release will bind her; and therefore it was reasonable he should perform his covenant. I found my opinion too on an old law well known in the city by the name of Jud's law, whereby a husband was authorized to agree with the father for the wife, though she was under age.

Where the
Share re-
leased shall
fall into the
dead Man's
or the Or-
phanage Part.

In the last mentioned case of *Medcalfe v. Ives*(*q*), a question arose, whether the orphanage part, covenanted to be released by the husband, should fall into the dead man's part, and go wholly according to his disposition of the residue of his estate, as a thing purchased by him; or whether it should fall into his personal estate, and be distributed with it according to the custom. And the lord chancellor said, that as in equity things covenanted to be done are things actually done, it must be considered as if the husband had actually released, and so is an extinguishment of his wife's right to the orphanage part; and being an extinguishment of the right, it leaves the estate of the father as if it had never been charged with it, and must therefore be considered as a part of his general personal estate, and not go wholly to the executor of the father as part of the dead man's share.

In the case of *Hill v. Blanket*, H., 28 Car. 2(r), it is said, that there is no such custom, as that a child marrying under the age of eighteen, without the father's consent, shall lose her orphanage part.

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But in the case of *Foden v. Howlett*, H., 1 Jac. 2(s), by Jefferies, Lord Chancellor: If the daughter of a citizen of London marries in his lifetime against his consent, unless the father be reconciled to her before his death, she shall not have her orphanage share of his personal estate: and it would be unreasonable to take the custom to be otherwise.

Whether Marriage without Consent bars the Custom.

And if any person intermarry with an orphan without consent of the court, such person may be fined by them, according to the quality and portion of the orphan; and unless such person pay the fine, or give security to pay it, they may commit him to Newgate, to remain there till he submit to their orders (t).

And he that marries an orphan without consent of the court, must make a jointure before he receives the portion (u).

Fowke v. Hunt, E., 1686(x). A freeman of London dies, leaving a widow and no children, but hath several grandchildren living at the time of his death. And the question was, whether they were within the custom of the city of London or not. The lord chancellor took time to consider of it; and having consulted the recorder and several of the aldermen, delivered his opinion, that grandchildren were not within the custom of the city of London.

Custom extends not to Grandchildren.

Northey v. Strange, H., 1716(y). It was admitted by counsel, and said to have been so determined and settled, that a freeman's grandchild (where the grandchild's father was never advanced in the freeman's lifetime, and died before the freeman, leaving a child) was not within the custom; and that only the freeman's children were within the custom, to come in for an orphanage part.

If a freeman of London hath but one child, and he has received some portion from his father, and the father dies, leaving this child and a wife, the child shall have his full orphan's part, without any regard to what he hath already received: for that advancement in part is only to be brought into hotchpot with children, and not with others (z).

Hotchpot only amongst Children.

Beckford v. Beckford, M., 1685(a). The only point was, upon the custom of the city of London, where a child that had a portion, but was not fully advanced, and was to bring her portion into hotchpot: whether the portion should be brought into the personal estate in general, that so the widow might

(r) Cha. Ca. Finch, 248.

(s) 1 Vern. 354.

(t) Priv. Lond. 282, 283; vide supra, "Form and Manner."

(u) Priv. Lond. 286.

(x) 1 Vern. 397.

(y) 1 P. Wms. 341; 2 Salk. 426.

(z) By Sir Edward Northey, 2 Salk. 426.

(a) 1 Vern. 345.

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come in for part of it, or whether it should be brought into the orphanage part only. Lord Chancellor: It is beyond all doubt that it must be brought into the orphanage part only.

Fane v. Bence, T., 1691 (*b*). Where an only child is in part advanced by the father in his lifetime, such child shall not bring his part into hotchpot, there being none in equal degree with him.

Cleaver v. Spurling, T., 1729 (*c*). A freeman of London having but one child, advanceth that child in part only; the child shall take a full share, without bringing what he had before received into hotchpot: for the only meaning of bringing the child's share into hotchpot is, to make an equality among the children; and not for the benefit of the mother, or to increase the dead man's share.

Lease.

A lease for years attending the inheritance of a freeman of London, is not assets within the custom (*d*).

Trust of a
Term.

So if a citizen of London has a trust of a term attending his inheritance, and dies, the trust of the term shall not be subject to the custom of London, to be divided between the wife and children, as other personal estate and chattels shall (*e*).

Mortgage.

A mortgage in fee shall be counted part of a freeman's personal estate, and subject to the custom (*f*).

A mortgage shall be paid out of the personal estate, in preference to the customary or orphanage part by the custom of London; because the custom of London cannot take place till after the debts paid (*g*).

2. Of the Custom of the Province of York.

By the statute of distribution 22 & 23 Car. 2, c. 10, s. 4, it is provided, that the said "act or any thing therein contained shall not any ways prejudice or hinder the customs observed within the city of London, or within the province of York, or other places, having known and received customs peculiar to them, but that the same customs may be observed as formerly; any thing therein contained to the contrary notwithstanding."

And by the 1 Jac. 2, c. 17, s. 8, "For the determining some doubts arising upon the said statute, it is hereby enacted and declared, that the clause therein by which it is provided that the same statute or any thing therein contained should not any ways prejudice or hinder the customs observed within the city of London and province of York, was never intended, nor shall be taken or construed to extend to such part of any intestate's estate, as any administrator, by virtue only of being administrator, by pretence or reason of any custom, may claim to have to exempt the same from distribution; but that such part in

(*b*) 2 Vern. 234.

(*c*) 2 P. Wms. 526.

(*d*) 1 Vern. 2, 102.

(*e*) 2 Freem. 66.

(*f*) 1 Cha. Ca. 285.

(*g*) 2 P. Wms. 335.

the hands of such administrator shall be subject to distribution as in other cases within the said statute.

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tribution.

By virtue only of being Administrator.]—That part which the administrator hath by virtue only of his being administrator, is the dead man's part; which being taken out of the custom, this statute of the 1 Jac. 2, c. 17, provides that the same shall be distributed according to the statute of distribution.

Decisions
under 1 Jac. 2,
c. 17.

And agreeable hereunto was the case of *Stapleton v. Sherrard*, Feb. 5th, in the 3 Jac. 2, which cause was depending when this statute was made: between John Stapleton, Esq. and Thomas Lord Meryon, plaintiffs; Bennet Sherrard, Esq. and Dorothy, his wife, administratrix of the goods of Robert Stapleton, Esq., defendants. This cause having been first heard on the 13th day of June, in the 35th of Charles II., and it being then referred to a master to take an account of the personal estate of the said Robert Stapleton, and to make exact distribution of the same according to law, amongst the plaintiff, Stapleton, and the child of the Lord Meryon, and also the brothers and sisters of the said Robert Stapleton, as well those of the whole blood, as of the half blood, and their respective representatives; the defendant, in right of the defendant, Dorothy, as she is widow of the said intestate, Robert Stapleton, claiming a moiety of the clear personal estate by the custom of the province of York, and also by the late act for settling intestates' estates half of the other moiety thereof; and the said master being thereby to report specially to this court, as he should think fit, what should appear doubtful as to the interest of any of the parties concerned therein, the said master made his report, dated the 9th day of June, 1684, whereby he certified, that by the custom of the province of York, a moiety of the said clear personal estate was of right due and belonging to the defendant, Dorothy, as the widow and relict of the said Robert Stapleton, and that the other moiety he had divided amongst the said intestates' brothers and sisters, and their legal representatives, in such proportions as is therein mentioned. And exceptions having been put in to the said report, and the same coming to be heard the 24th day of February, in the first year of King James II., before the right honourable the lord keeper of the great seal of England, his lordship desired his grace, the then Lord Archbishop of York to certify, when a man dies intestate within the province of York without issue (after his debts and funerals paid), how the residue was to be divided by the custom of the province of York, and what part remained by the ordinary to be distributed. And his grace, the then Archbishop of York, having, pursuant to the said desire, on the 18th day of March in the first year of James II., certified, that in such cases aforesaid, the widow of the intestate by the custom of the said province, hath usually had allotted to her one moiety of the clear personal estate, and that the

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other moiety had been distributed amongst the next of kin to the deceased intestate, and that had been the constant practice of the ecclesiastical court at York. To which certificate the said defendants took exceptions. Upon debate whereof on the 17th of May, in the said first year of James II., it was ordered, that the exceptions should be overruled; and the defendants were ordered to pay unto the plaintiffs, and bring into court respectively, the several and respective sums of money therein in that behalf mentioned within two months, or in default thereof, or if the plaintiffs should not acquiesce therein, then they were to pay costs. And the defendants being not satisfied with the said order, did afterwards petition the right honourable the lord high chancellor of England for a rehearing of the said cause, upon this point only, namely, whether the defendant, Dorothy, being the widow of the said Robert Stapleton, who died an inhabitant of the province of York, and without issue, and also his administratrix, ought not by virtue of the custom of the said province, to have one moiety, or half of the clear personal estate of the said intestate, Robert Stapleton, her late husband, and also according to the rules of distribution mentioned in the late act for settling intestates' estates to have half of the other moiety as widow of the said Robert Stapleton, who died without issue as aforesaid. And his lordship having ordered the said cause to be reheard upon that point only, and the same coming to be reheard accordingly before his lordship in the presence of the defendant's counsel, none attending for the plaintiffs, albeit due notice of the said last order for rehearing was given to them and the other parties concerned, as by affidavit then produced did appear; and the case on the pleadings in the cause being opened by the defendant's counsel, and upon consideration thereof, and of the said late act for settling of intestates' estates, and of the statute made in the first year of his said majesty King James II., intituled An Act for Reviving and Continuing several Acts of Parliament therein mentioned, his lordship declared, that notwithstanding the said certificate of the said Lord Archbishop of York, his lordship was fully satisfied, the defendant, in right of the defendant Dorothy, as widow of the said intestate, Robert Stapleton, her late husband, ought to have the one moiety or half of his clear personal estate by virtue of the custom of the province of York, and also half of the other moiety of the said clear personal estate by virtue of the said statute and rules of distribution therein mentioned: and did order and decree the same accordingly. And it being alleged, that the defendants, in pursuance of the said former decree, and to avoid any contempt for not yielding obedience thereto, had paid and satisfied unto the plaintiffs and others the brothers and sisters of the said intestate, Robert Stapleton, or their respective representatives or some of them, the respective proportions to them respectively

allotted by the master's report, whereas they ought but to have paid one moiety thereof, and prayed that the plaintiffs and the said other persons that were so over-paid might refund and pay the defendants the moiety or half of the money so paid or satisfied unto them, his lordship did order and decree the same accordingly, and the 5*l.* deposited with the register upon the granting of the said rehearing to be paid back to the defendants or their clerks in court. Afterwards, on the 8th day of June, in the third year of the reign of his said majesty King James II., the plaintiffs being dissatisfied with the said order made, petitioned his lordship to hear the cause again; and the same coming to be reheard accordingly on the 5th day of February, in the year aforesaid, before his lordship, in the presence of counsel learned on both sides, upon long debate of the matter, and hearing what could be alleged on either side, his lordship declared the defendant's wife is well entitled to one moiety of her late husband's estate by the custom of the province of York, and to a moiety of the other moiety by the act of distribution, and therefore saw no cause to alter the former order; and therefore did order, that the said former order should stand confirmed.

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tion.

By the 4 Will. 3, c. 2, ss. 1, 2, "Whereas by custom within the province of York, or other usage, the widows and younger children of persons dying inhabitants of that province, are entitled to a part of the goods and chattels of their late husbands and fathers, (called her and their reasonable part), notwithstanding any disposition of the same by their husbands' and fathers' last wills and testaments, and notwithstanding any jointures made for the livelihood of the said widows by their husbands in their lifetime, which are competent, and according to agreement, whereby many persons are disabled from making sufficient provision for their young children; for remedy thereof it is enacted, that it shall be lawful for any person inhabiting or residing, or who shall have any goods or chattels within the province of York, by their last wills and testaments, to give, bequeath and dispose of all and singular their goods, chattels, debts and other personal estate, to their executors, or such other persons as they shall think fit, in as ample manner as by the laws and statutes of this realm any person may give and dispose of the same within the province of Canterbury, or elsewhere; and the widows, children, and other the kindred of such testator, shall be barred to claim or demand any part of the goods, chattels or other personal estate of such testator, in any other manner than as by the said last wills and testaments is limited and appointed."

4 Will. 3,
c. 2.

Sect. 3, "Provided, that nothing in this act shall extend to the citizens of the cities of York and Chester, who shall be freemen of the said respective cities, inhabiting therein or within the suburbs thereof at the time of their death; but that

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c. 5.

every such citizen's widow and children shall have such reasonable part and proportion of the testator's personal estate, as they might have had by the custom of the province of York before the making of this act."

Note, the mentioning of the city of Chester here was a mistake (*h*), for this custom of the province of York did not extend to that city, nor to any other part of the whole archdeaconry of Chester; and the reason is, because until the erection of the see of Chester in the time of King Henry VIII., that archdeaconry was not within the province of York, but was part of the diocese of Litchfield and Coventry, within the province of Canterbury; and therefore afterwards, when this proviso was taken off by the statute here next following, with respect to the city of York, there was no need for any application to parliament to repeal the same proviso in relation to the city of Chester.

But as to the city of York, it is enacted by the 2 & 3 Anne, c. 5, as followeth, "Whereas in the statute of the 4 Will. 3, c. 2, there is a proviso, that nothing in the said act contained should extend or be construed to extend to the citizens of the cities of York and Chester, who should be freemen of the said respective cities, inhabiting therein or within the suburbs thereof, at the time of their death, but that every such citizen's widow and children should have such reasonable part and proportion of the testator's personal estate, as they might have had by the custom of the province of York before the making of the said act; and whereas notwithstanding, the mayor and commonalty, on behalf of the inhabitants of the said city of York, have requested that the said proviso may be repealed so that the freemen of the said city may have the benefit of the said act, as well as all other persons inhabiting within the said province, it is enacted, that the said proviso, so far as the same concerneth the citizens of the city of York, shall be and is hereby repealed, so that it shall and may be lawful for all and every the citizens of the said city of York, who shall be freemen of the said city, inhabiting therein or within the suburbs thereof, at the time of their death, by their last wills and testaments, to give, bequeath and dispose of their goods, chattels and other personal estates, to their executors or such other persons as they shall think fit, as any other persons inhabiting or residing within the said province of York may lawfully do by virtue of the said act, and that the widows, children and other kindred of such testator, shall be barred to claim or demand any part of the goods, chattels or other personal estate of the testator, in any other manner than as by the said last wills and testaments is appointed, any thing in the said act, or any other law, statute, or usage to the contrary notwithstanding."

(*h*) [See Lord Alvanley's remarks in *Pickering v. Stamford*, 3 Ves. 338. —ED.]

So that the ancient law and custom restraining the inhabitants of the province of York from disposing of their whole personal estates by will, is now utterly abolished out of that whole province.

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tion.

But with respect to the distribution of intestate's effects, the custom continues as it hath been for ages past; which, taking Swinburne for our guide, we come now to trace out and delineate.

It is to be understood then, that within the province of York generally, there hath been an ancient custom, and divers famous writers long ago have made mention of the said custom in their work to have been observed long before their days, and the same also appeareth from the acts and other very ancient instruments of undoubted credit faithfully preserved in the registry of the Archbishop of York, by which custom "there is due to the widow and to the lawful children of every man being an inhabitant or an householder within the said province of York, and dying there or elsewhere intestate, being an inhabitant or householder within that province, a reasonable part of his clear moveable goods, unless such child be heir to his father deceased, or were advanced by his father in his lifetime, by which advancement it is to be understood that the father in his lifetime bestowed upon his child a competent portion whereon to live (i).

Reasonable part.]—Which is as followeth:—

What is a
reasonable
Part.

(1.) If the intestate hath *neither wife nor child* at the time of his death, his whole personal estate (the funeral expenses and other necessary charges being first deducted) shall be disposed in the due course of administration, the same heretofore having been wholly at the disposal of the deceased, and consequently falling now under the directions of the statute of distribution (k).

(2.) If the intestate at the time of his death leave behind him *a wife and no child*, or else some *child or children but no wife*, in this case, by the custom observed not only throughout the province of York, but in many other places besides within this realm of England, the goods are to be divided into two parts, of which, one part is due to the wife, or else to the children, by virtue of the said custom (l).

But if by settlement a jointure is limited to the wife, in bar of all her demands out of the personal estate of her husband by virtue of the custom, in such case it is as if there were no wife, with respect to the said customary part; so, if it is in bar of all her demands by virtue of the said custom *or otherwise*, she shall be debarred also of any distributive share by the statute (m).

(i) Swin. 220, 230, 233.

(k) Swin. 220.

(l) Swin. 220.

(m) 1 Vern. 15.

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tion.

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ment.

And if the intestate have a wife, and a child or children, which child is *heir* to the intestate, or which children were *advanced* by the father in his lifetime, in this case it is as if he had no child, and therefore in like manner the goods shall be divided into two parts, whereof the wife is to have the one part to herself, and the other half is distributable by the statute (n).

So in the case of *Goodwin v. Ramsden* (o), M., 1683. The plaintiff exhibited a bill, to have an account, and her share of her father's personal estate, who died intestate. The defendant pleaded, that the estate in question lay within the province of York, and that the intestate died there, and that the plaintiff being one of his daughters was advanced by him in his lifetime, and that by the custom of the province of York, a daughter being once advanced by her father in his lifetime, was excluded from all further benefit of her father's personal estate. But in this case it appearing that all the children of the intestate were advanced by him in his lifetime, and so the estate wholly exempted out of the custom, it ought to go now in a course of administration, and be distributed according to the act for settling intestates' effects, and thereupon the plea was overruled (o).

And in the case of *Collinson v. Trotter*, June 24, 1727, Richard Collinson died intestate, leaving a widow, who was the present defendant, Anne Trotter, and an only child, Thomas Collinson, the plaintiff in this cause. Sir Joseph Jekyll, Master of the Rolls, directed two issues to be tried at the York assizes: 1. Whether the defendant, Anne Trotter, who was the widow, is entitled by the custom of the province of York to a moiety, or any and what part of the intestate's estate. 2. Whether the plaintiff, Thomas Collinson, the infant, who is entitled to lands in fee simple by descent, on the death of his said father, is by the custom of the said province entitled to any and what part of his said father's personal estate. These two issues were tried accordingly at the summer assizes following. And after long evidence given, the jury found, as to the first issue, that the wife is entitled by the said custom to a moiety of the intestate's personal estate; and, as to the second, that the son is excluded by the descent of the fee simple estate from claiming any part of the personal estate by the said custom. And consequently, the widow would receive one-half of the personal estate by the custom, and one-third of the remaining half by the statute; so that, taking the whole together, she would receive two-thirds of the said intestate's personal estate.

(3.) If the intestate at the time of his death had *both a wife and also a child or children*, in this case, the deceased's share is no more than the third part of the clear goods; for the said goods shall be divided into three parts, whereof the wife ought to have one part, the child or children another part, and the

(n) Swin. 220, 221.

(o) 1 Vern. 200.

third part (which is called the death's part) is distributable by the statute. Yet so, as that the child or children be not *heir* to the intestate their father, or *advanced* by him in his lifetime; for then it is as if there were no child, and consequently the goods of the deceased are to be divided into two parts, whereof the intestate's wife is to have the one part, and the other is distributable by the statute. And if the intestate have a wife, and children whereof one is *heir*, and another *advanced*, and some *not advanced* by their father in his lifetime, in this case, the goods of the deceased shall be divided into three parts, whereof the wife shall have one, the child or children not advanced another, and the third (being the death's part) is distributable as aforesaid (*p*).

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Advance-
ment.

But here ariseth a very important question in case where a child hath received in his father's lifetime an advancement, not only sufficient to debar him of his customary part, but so large as to extend into or to overbalance what would be his proportionable share also of the dead man's part, whether in this case such child shall receive any share of the dead man's part, unless he will bring over into hotchpot in the said dead man's part so much of his said advancement as exceedeth his just proportion of the customary part: and concerning this, the opinions of learned men are various; some hold, if a child is fully advanced, so as that his advancement doth exceed not only what would be his just proportion of the customary part, but of the dead man's part likewise; that in such case he is excluded from any further share whatsoever of his father's personal estate, either by the custom or by the statute. Others are of opinion that whatsoever his advancement shall have been, so as to debar him his customary part, yet that advancement shall have no consideration in the dead man's part, but thereof he shall receive his full share without any retrospect to his preceding advancement. The former opinion is more agreeable to equity and reason; but whether it is consistent with the construction of the statutes is the question. For this is a point respecting not the custom but the acts of parliament: the custom itself in this case is clear enough, but it is questioned how far the statutes do infringe the custom in this particular.

Before the statute of the 22 & 23 Car. 2, the custom was this: The children received their own customary part and no more; and of this customary part a child fully advanced could have no share, the advancement being esteemed as a satisfaction for his filial portion: and no child could sue for any share of the dead man's part; the same (according to its original institution) being to be disposed for the soul of the deceased. This statute left the custom entire; and the statute of the

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1 Jac. 2, c. 17, doth not touch thereupon, further than to distribute the said dead man's part: nevertheless in such distribution it is required that the children (exclusive of the heir at law as aforesaid) shall bring their respective advancements into hotchpot. But in this case the advancement is supposed to be already sunk in the customary part; and consequently nothing remained to be brought over into the dead man's part: and therefore (upon this supposition) a child, how largely soever advanced by his father in his lifetime, shall only thereby be excluded from receiving any further filial portion by the custom, but shall not be excluded from receiving a full distributive share of the dead man's part by the statute.

And with this seemeth to accord the case of *Gudgeon v. Ramsden*, T., 1692 (q), which was thus: The intestate, being an inhabitant in the province of York, left issue a son and daughter only, and no widow. The daughter had a portion given her in marriage in lieu and full satisfaction of what she might claim by the custom of the province. The son was also advanced by a settlement of lands. The question was, how this estate should be distributed. For the heir it was insisted, that now the custom of the province of York is to be quite laid out of the case, and the same distribution made of the estate as of any other intestate's estate, and by consequence the daughter to bring her portion into hotchpot; but the heir to have a full share, without regard to what lands had been settled upon him. By the court: "The daughter must not bring back her portion into hotchpot, for that came in lieu of the customary part, and was as the price the father thought fit to give her for the same.

But here it seemeth that a distinction ought to be made between an advancement given and accepted expressly in lieu and satisfaction of the filial portion, and an advancement given generally without any such agreement or stipulation. In the former case it seemeth that no respect shall be had of such advancement in the distribution of the dead man's part, the same being to be considered not so properly an advancement by the father as a purchase by the child; and which by possibility might have fallen short of as well as exceeded the true value of the child's portion (r). And upon this principle the

(q) 2 Vern. 274.

(r) For a child of age, for a valuable consideration, might release his future filial portion. Of which kind of release there seems to have been a special precise form, according to the following example, which is brief, and yet full withal and comprehensive, much in the style and manner of those most accurate forms of com-

position, the writs in the register, viz.—

"Be it known unto all men by these presents, that I Thomas Whitehead, of Byebeck, in the county of Westmoreland, husbandman, for and in consideration of a sum of money, by Richard Whitehead, my father, of Byebeck aforesaid, in the said county, yeoman, to me well and truly contented

said case of *Gudgeon v. Ramsden* seemeth to have been determined. But where there is no such special contract or agreement, but the advancement is general, without any particular respect either to the customary or distributive share, it seemeth that the same shall be applied either to one or both of them, according to the amount of such advancement, and so as best to answer the intent of the statute, which expresseth that *the estate of all the said children shall be made equal as near as can be estimated*. And by this distinction the two contrary opinions seem to be reconciled.

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Of his clear moveable Goods.]—Where the wife or children ought to have a rateable part of the goods of the deceased, be it a third part or half, as the case yieldeth, there also they ought to have a like part of the *debts* due unto the intestate, after they be recovered by the administrator; for then they are numbered or accounted amongst the goods of the intestate, but not before (s).

Rateable Part
of Goods.

But of *leases* (Swinburne says (t)) the wife and children cannot have any rateable part within the province of York or other places where they have been accustomed to have their rateable part of the moveable goods and debts recovered, unless the said wife or children demanding their rateable part of leases do prove that by special custom of that place (namely, of that city, county, deanry or parish where the intestate dwelled, and had such leases) the wives and children were accustomed to have their rateable part as well of the leases as of the moveable goods of the intestate; which special custom being proved, they may recover the rateable part as before. (But not by the general custom of the province.)

But concerning estates *pur autre vie*, that is to say, estates held by lease during the life of another person, it is specially provided by the statute of the 14 Geo. 2, c. 20, that where there is no devise thereof, they shall go and be distributed in the same manner as the personal estate of the intestate.

and paid, have remised, released, and quit claimed, and by these presents do absolutely remit, release, and quit claim unto the said Richard Whitehead my father, his executors and administrators, all manner of filial or child's portion of goods which I the said Thomas, my executors or assigns, can or may hereafter have, claim or demand of, in, and to the goods or chattels of the said Richard Whitehead, by any manner of ways, means, title, or claim howsoever. In witness whereof I the said Thomas Whitehead have hereunto set my seal the first day of May, in the eighth year of the reign of our sovereign Lord James by the grace of God King of England, France, and Ireland, De-

fender of the Faith, and so forth, and of Scotland the forty-third, 1610.

“ Thomas Whitehead.

“ Signed and delivered
in the presence of us,

“ George Sharp,
Edward Branthwaite,
Thomas Potter,
Philip Winster.”

And here it is observable that the particular sum which was the consideration is not specified; so that there is no room here to dispute about the *quantum* of the advancement; for it must be taken in such case as an advancement *in toto*.—Burn.

(s) Swin. 221.

(t) Ibid.

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tutes of Dis-
tribution.

The Heir.

Unless such Child be Heir to his Father deceased.—Which limitation is diversely extended: as

(1) Not only the heir of lands holden in fee simple is thereby barred from the recovery of a filial portion, but he also that is heir in fee tail, either general or special (*u*).

(2) Albeit the lands be of very small revenue, peradventure not past a noble yearly rent, and the goods very great in comparison of so small a rent (be it 1000*l.* or more), even in this case the heir is barred from the hope of a filial portion. And though this may seem hard to the heir, if we consider that same right of primogeniture, yet if we shall consider on the other side that if the lands be worth 1000*l.* a year, and the goods little or nothing worth (the debts being paid), and so little or nothing left to the rest of the children (which case is more frequent than the former), the custom we see is not void of equity when both cases are equally balanced (*x*).

(3) Not only that heir is excluded from a filial portion which doth enter upon the lands immediately after his father's death, but he also which is heir in reversion is heir; and being heir can have no filial portion. For in the writ *de rationabili parte bonorum* it is contained that he which demandeth a filial portion *neither is heir nor was advanced in the life of his father*: now he that is heir in reversion cannot say so, and therefore can recover no filial portion according to the custom of the country. Otherwise if he should recover a portion, and the land afterwards; the final intent of the custom should suffer prejudice, which would that the lands and goods should not go both one way, but the one to the heir and the other to the rest of the children. And yet the case may fall out very hard with the heir in reversion; for what if he should die in the mean time before he could lawfully enter to those lands which be his only in reversion; and so reap no benefit either of his father's lands or goods? Howsoever it shall fall out, he must be content with his lot; and though not he, yet his shall enjoy the land at the time appointed (*y*).

(4) Albeit the heir received the lands by settlement made upon his father's marriage, yet he is heir so as to be excluded thereby from a filial portion. As in the case of *Constable v. Constable*, T., 1700 (*z*). Upon a former hearing of this cause, a question arising upon the custom of the province of York, touching the distribution of the personal estate of the father; an issue was directed to be tried at law, whether the father having by settlement on his marriage settled his real estate to himself for life, part to his wife for her jointure, and the remainder of the whole to his *first* and other sons in tail, remainder to his own right heirs, the eldest son was thereby excluded by the custom of the province of York from having

(*u*) Swin. 231.

(*x*) Ibid. 232.

(*y*) Swin. 232.

(*z*) 2 Vern. 375.

any share of his father's personal estate; and it being found that he was thereby debarred and excluded, and the cause coming now to be heard on the equity reserved, it was decreed accordingly.

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tribution.

(5) Albeit the heir hold lands by deed or feoffment in mortgage, or with clause of redemption, that is to say, upon condition that if the feoffor pay unto him a sum of money at a certain day, that then the feoffor may re-enter, and the deed or grant to be void; yet nevertheless in the meantime, until the condition be performed, and the land redeemed, if he should demand any filial portion, he is barred, because as yet he is heir to the deceased. But if the lands should be redeemed, and the money satisfied, then it is thought that he may recover a filial portion; because then he is not heir to the deceased, nor the advancement certain which was made by the father in his lifetime (a).

(6) Likewise if a man purchase lands in fee, and by will devise the same lands to his eldest son and to the heirs of his body, and for default of such issue to his younger son and to the heirs of his body, and so on; in this case, Swinburne says, the eldest son is not barred from the recovery of a filial portion as heir to the deceased; because he is not as heir to his father according to the course of the common law, but according to his father's will (b). But whether this devise shall bar him as an advancement is another question, which will be considered afterwards.

But where a man is heir at law of lands in fee simple, and his father also deviseth those lands to him; it seemeth that he shall take by his better title, as heir at law, and not as devisee: and consequently thereby shall be excluded from a filial portion. For no man can by his will make his heir a purchaser of a fee simple; for the descent will take effect at the same time, and the elder title shall be preferred.

(7) In like manner, the youngest son, who is heir in *borough English*, seemeth not to be heir, so as thereby to be debarred from a filial portion; for he is not heir according to the course of the common law, but by a particular custom.

(8) Note also, that if the child should have any *copyhold* land after his father's death; in this case he is not reputed his father's heir to the effect aforesaid, and so barred from the recovery of a filial portion, due by the general custom of the said province (c).

Note, the word *copyhold*, although of itself it conveys an idea distinct enough, yet from the different acceptation of it amongst learned men, it becometh equivocal; some using it to signify all lands which are not freehold; others, more properly, lands only which are holden by copy of court roll. It

(a) Swin. 232.

(b) Ibid.

(c) Ibid.

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is of very much importance to determine in which of the two senses it is here to be understood. For a great part of the lands within the province of York are neither freehold nor copyhold, but are included under the word *customary*.

For *customary* is the general denomination of lands holden by the custom of the manor, of which *copyhold* is but one species; so that although all copyhold lands are customary, yet all customary lands are not copyhold. And it seemeth that the word *copyhold* here shall be understood in the less proper sense, so as to signify that *customary* lands in general, as well as those which are strictly *copyhold*, inherited from the father, shall be no hindrance to the child from obtaining a filial portion. For at the time when this custom of the province of York took place these customary lands were not inheritable.

When Ad-
vancement
debars Child
of filial Por-
tion.

Or were advanced by his Father in his Lifetime.—Here it comes to be considered, what manner of preferment or advancement that is, which doth debar the child from a filial portion.

By his Father.—For if another than the father bestow any preferment or advancement, though never so much, this preferment by another is no bar to the child from the recovery of the filial portion of his father's goods, much less where the child hath advanced his estate by his own industry (*d*).

In his Lifetime.—Here the case aforesaid is considerable, where the father by his last will deviseth lands to his son (for this he may well do, and yet nevertheless die intestate as to his goods), whether this shall be such an advancement as shall debar the son from the recovery of his filial portion; and it seemeth that it shall not: for this was no advancement to the child in the lifetime of his father; but he may refuse or waive the bequest, and recover a filial portion due according to the custom of the country (*e*).

Howbeit, if the father in his lifetime bestow a lease upon his child, or grant unto him an annuity for life out of his lands, yet in such manner as the child shall not reap any benefit thereby so long as the father liveth, but after his death, this is holden for a preferment or an advancement, because it was assured unto him in his father's lifetime. Nor is this case contrary to the former: for the child had no assurance of his devise until his father was dead, because he might have revoked the same at any time whilst he lived, which he could not do in the other case (*f*).

That the Father in his Lifetime bestowed upon his Child.—For if the father bestow any thing upon another for his child's sake, or for the good of his child, nevertheless this is no such preferment as will hinder the child of his filial portion (*g*).

(*d*) Swin. 233.

(*e*) Ibid.

(*f*) Ibid.

(*g*) Ibid.

And therefore if the father bestow any thing upon a man of trade, to take his son for an apprentice, and to teach him his mystery, this is no advancement to the effect aforesaid (*h*). Construction of the Statutes of Distribution.

Or if he bestow any thing upon a schoolmaster, or tutor in the university, for the increase of his knowledge in learning, or for any degree there to be obtained, this is no advancement to exclude the child of a filial portion (*i*).

No more is it (saith Swinburne (*k*)) if the father buy the advowson of an ecclesiastical benefice or dignity, and afterwards present his son thereto.

So if the father buy an office, and bestow it upon his son, this seemeth (he says) not to be an advancement to bar him of his portion (*l*).

Or if the son be much indebted, and the father discharge the debt, yet this seemeth not to be a preferment (*m*).

But if the father bestow a competent portion with his daughter in marriage upon him that shall marry her, this, without question, is such an advancement as will bar her from the demand of a filial portion (*n*).

A competent Portion.]—By the word *portion* is to be understood not only a sum of money, or part of the father's goods and chattels, but also lands and annuities bestowed by the father upon the son (*o*). What is a competent Portion.

Competent.]—Competent signifieth equal, or not far inferior, to that quantity, which otherwise according to the custom of the province, should fall to be due to the child, after the rate and proportion of the father's estate, at the time when he doth bestow any such thing upon his child; for the same being equal, or not much under the rate which should belong to the child by the custom aforesaid, if his father had then died, shall stand for a sufficient preferment and advancement, to exclude him from a filial portion. For considering the equality, or small inequality, betwixt the one and the other, it is to be presumed that it was the father's purpose that the one should stand instead of the other. Insomuch that if the father after this preferment should live many years, and increase his substance, yet it seemeth that the father's former gift would bar the child from recovery of any farther filial portion; and the reason is, because as the father did grow richer (in which case the son's preferment should be less), so it might fall out that the father might have grown poorer, and then the son's preferment should have been more than otherwise it would by the custom of the country. So that the father's gift being at the first competent in regard of his estate at that time, the same is not made effectual or ineffectual by the increase or decrease of his future estate (*p*).

(*h*) Swin. 233.

(*i*) Ibid.

(*k*) Ibid.

(*l*) Ibid.

(*m*) Ibid.

(*n*) Ibid.

(*o*) Swin. 234.

(*p*) Ibid. 333, 234,

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tutes of Dis-
tribution.

But if the father's gift were not competent, or far under the rate of that which otherwise should belong to the child by the custom; as, for instance, if the father should give his child 5*l.* to put in his purse to bestow at his pleasure, whereas otherwise his filial portion would extend to divers hundreds, this gift of the father doth not seem to be such an advancement as will exclude the child from his filial portion, neither in the construction of law nor in the intention of the father; and that is rather to be termed a mere benevolence than a preferment or advancement exclusive of a filial portion; and if the son have deserved a good turn at his father's hands, this is no advancement, but a recompense of that which was formerly deserved (*q*).

But here ariseth a question: what if the thing which the father bestowed upon the child be so indifferent between competent and incompetent, that it may be justly doubted whether the same shall stand for an advancement or a mere benevolence, over and besides which he might expect a filial portion? Now whether may the child cast in that gift of the father, and so recover an equal portion with the rest of his brethren and sisters? It seemeth at the first that he may. For if a man seised of thirty acres of land in fee simple, have issue two daughters, and giveth with one of them in marriage ten acres of the same land in frank marriage, and died seised of the other twenty acres, she that is thus married may, if she will, have part of the twenty acres whereof her father died seised; but then she must put her land given in frank marriage in hotchpot, that is to say, she must refuse to take the sole profits of the land given in frank marriage, and suffer the land to be commixed and mingled together with the other land whereof her father died seised, so that an equal division be made of the whole betwixt her and her sister; and thus for her ten acres she shall have fifteen; whereas otherwise her sister shall have the twenty acres of which their father died seised. And as in lands so in goods, which is also agreeable to the civil law. And Swinburne says he hath seen it sometimes so observed, by the consent of the children not advanced, being then of lawful years; but he hath not known it at any time so overruled by law without their consents. And therefore he concludeth that, considering the strictness of the writ *de rationabili parte bonorum*, this gift of the father shall either be found to be a preferment or not; if it shall be found to be a preferment, then is the child excluded from recovery of a filial portion; if it shall be found not to be a preferment, then may the child recover the filial portion according to the custom of the province of York, as in the said writ is contained (*r*).

But nevertheless, the words of the writ do not seem necessarily to infer this consequence, being only general, that *chil-*

(*q*) Swin. 234.

(*r*) Swin. 235.

dren not promoted in their father's lifetime ought to have their reasonable part; for this they may have, and yet notwithstanding be required to bring into hotchpot with their brothers and sisters what they shall have received less than their due proportion; and it will be so much the more *reasonable* upon that account. And therefore what Swinburne intimates was in his days recommended to the parties by the judge, seemeth, at least since that time, generally to have prevailed as the custom of the province, that children (exclusive of the heir at law) not advanced to their full proportion of the children's part shall be admitted to come in for their share of the said children's part, bringing thereunto their partial advancements into hotchpot, agreeable to what Swinburne acknowledgeth to be the rule of the civil law, in conformity also to the custom of the city of London, and to the measures of the statute of distribution, and to the rules observed by the courts of equity in all such like cases.

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tutes of Dis-
tribution.

Whereon to live.]—If the father bestow any thing upon his child to any other end, as money in his purse to spend among his equals, or to buy him suits of apparel, or books or armour for the service of his country, yet this (as it seemeth) is not to be holden for an advancement, though peradventure the sums of money given for these particular ends were not very much inferior to that which otherwise might belong to the child for his filial portion according to the custom, and otherwise would have been taken for an advancement; but it must be a provision of some competent thing for the maintenance of his child, whereby he may be the better enabled to live after his father's death (s).

It is said by the editors or continuators of Swinburne, that it hath been much controverted whether the ordinary hath power to compel the administrator to give portions to children, or to allot and distribute filial portions to the deceased's children out of his estate. If the ordinary attempt this, either before or after the granting of letters of administration, it hath been held that the administrator might have a prohibition; and that the ordinary hath not any power to make distribution of the surplusage, nor to take any bond to answer the same; for that if the ordinary might distribute, then the administrator might be charged of his own goods; for there may be dormant debts, and which are unknown; yet, notwithstanding, they add that it is usual for the ordinary to order and allot distribution of filial portions, and therein prohibitions are not often granted (t).

But whether this is spoken of the times before the statute of distribution, doth not appear. As to the dead man's part, there seemeth to be no doubt but the ordinary, by the said statute,

(s) Swin. 234.

(t) Swin. 233, a.

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tribution.

may cause distribution thereof. And as to the widow's and children's portions, the statute provides that the custom shall be observed as before. And it seemeth that the ordinaries within the said province, even as all other ordinaries, before the making of the said act, did exercise a power of compelling distribution, although the temporal courts would not allow the same to be lawful, and that was the cause of the act being made. And the act says that "*All ordinaries, as well the judges of the Prerogative Courts of Canterbury and York as other ordinaries*, shall have power to order and make just and equal distribution."

There is a case wherein the customs of the city of London and the province of York did interfere, which was thus: *Chomley v. Chomley*, E., 1688 (u). A freeman of London died within the province of York, leaving a widow, and issue two sons and a daughter; and an estate of about 50*l.* a year within the province of York descended on the elder son; and if the custom of the province of York should prevail, he would thereby be excluded from having any share of the personalty, which was about 20,000*l.* A bill was brought for the direction of the court, how and in what manner the personal estate should be disposed of. And the court was clearly of opinion that the deceased being a freeman of London, the custom of the city for the distribution of the personalty should prevail and control the custom of the province of York; and that notwithstanding the custom of the province to the contrary, the heir should come in for a share of the personal estate; for the custom of the province is only local, and circumscribed to a certain place; but that of London follows the person, though never so remote from the city.

Summary of
the Course of
Distribution
of Intestates'
Effects in the
Province of
York.

Upon the whole, so far as can be estimated from the premises, the course of distribution of intestates' effects within the province of York seemeth to stand thus:

1. If a person dieth intestate, leaving no wife, but *an only child*, which child is *heir at law*, or *advanced*, or *partly advanced*, or *not advanced*, in all these cases it maketh no difference; for one way or other such child shall have the whole clear personal estate. For supposing such child to be *heir at law*, he shall have nothing by the custom, but by the statute he shall have the whole as next of kindred. If he is *advanced*, he shall likewise have nothing by the custom, but by the statute in like manner he shall have the whole. If he is *partly advanced*, he shall have one-half by the custom, there being no other child with whom to bring his partial advancement into hotchpot, and the other half by the statute. So in like manner if he is *not at all advanced*, he shall have one-half by the custom, and the other half by the statute.

2. If such person hath *divers children, one of whom is heir at law, and the others are advanced*, in this case, with respect to the custom, it is as if he had no children; none of them can claim anything by the custom; and (the younger children being supposed to be fully advanced) the heir at law by the statute shall have the whole.

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tribution.

3. If such person hath *divers children, the first of which is heir at law, the second advanced, the third partly advanced, and the fourth not advanced*, in this case the child *partly advanced* and the child *not advanced* shall have one-half equally betwixt them by the custom, the child partly advanced first thereunto bringing his partial advancement into hotchpot; and the other half (which is the dead man's part) shall be distributed by the statute equally amongst all the said children, (the second only excepted, who is supposed to be fully advanced already) share and share alike. But if the heir at law hath been advanced by his father, otherwise than by lands or as heir at law, he shall bring such his advancement into hotchpot with his brothers and sisters, otherwise he shall have no distributive share by the statute.

And note, that the representatives of children dead are admitted by the statute to a distributive share of the dead man's part, in the place of the deceased child or children whom they represent; but not so the customary part by the custom.

4. If a man hath *a wife and no child*, she shall have (besides her convenient bed and apparel) one-half by the custom, and the other half (being the dead man's part) shall be distributed by the statute; of which dead man's part by the said statute she shall have one-half, and the other half shall go to the next of kindred to the deceased in equal degree: so that dividing the same into four, she shall have three and they shall have one.

But if although there be no child, yet there hath been a child, and there are any legal representatives of such child deceased, then of the dead man's part by the said statute the wife shall have but one-third, and the said representatives shall have the other two-thirds: so that dividing the whole into six parts, she shall have four and they shall have two.

5. If a man hath *a wife and also a child or children, one of which children is heir at law, and the others are advanced*, in this case with respect to the custom it is the same as if he had no child; and consequently the wife shall have one-half by the custom and the other half (being the dead man's part) shall be distributed by the statute; of which dead man's part by the said statute she shall have one-third, and the other two-thirds shall go to the heir at law as aforesaid: so that dividing the whole into six parts, she shall have four and he shall have two.

6. If a man hath *a wife and also a child or children, any*

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one or more of which children are not advanced, by the custom she shall have one-third part, and the children not advanced shall have another third part, and the remaining third part (being the dead man's part) shall be distributed by the statute; of which dead man's part by the said statute she shall have one-third, and the other two-thirds shall be distributed amongst the children in manner as is aforesaid: so that dividing the whole into nine, she shall have four and they shall have five.

As for example: a man inhabiting within the province of York dieth intestate, leaving a clear personalty of 9000*l.*, and leaving a widow and four children, the first being heir at law to freehold lands, and having received likewise of his father in his lifetime 400*l.* to set him up in trade; the second advanced to the amount of 3000*l.*; the third partly advanced to the amount of 600*l.*; and the fourth not at all advanced. The question is, how this personalty shall be distributed. First of all, the widow shall have one-third part by the custom, as her widow's portion, to wit, 3000*l.* Another third part by the said custom shall be distributed amongst the children, of which the heir at law (as such) by the said custom is excluded from receiving any share; the second son also, as being fully advanced, is excluded; but hereunto the third son shall bring his partial advancement of 600*l.* into hotchpot, and then the third and fourth sons shall divide the 3600*l.* equally between them; but the real benefit thereof to the third son will be but 1200*l.*, and to the fourth son 1800*l.* The remaining third part of the said personalty, which is the dead man's part, shall be distributed by the statute, of which by the said statute the widow shall have one-third, to wit, 1000*l.*, and the residue, being 2000*l.*, shall be distributed equally amongst the said three children, namely, the heir at law and the third and fourth sons (the heir at law being let in for so much by the statute), and the second son being still excluded, as having received more than his just proportion of his father's whole personal estate; but hereunto the heir at law shall first bring his partial advancement of 400*l.* into hotchpot, and so the said three children shall divide the whole 2400*l.* equally amongst them; but the real benefit thereof to the heir at law will be but 400*l.*, and to the said two youngest children 800*l.* each. So that of the whole clear personalty of 9000*l.*

The widow shall receive . . .	4000 <i>l.</i>
The heir at law	400 <i>l.</i>
The second child	...
The third child	2000 <i>l.</i>
The fourth child	2600 <i>l.</i>
Total . . .	<u>9000<i>l.</i></u>

7. If a person dieth intestate, leaving *neither wife nor child, but a father living*, the same is out of the custom, and (supposing there is no representative of any child deceased) then the father, by the statute, as next of kindred, shall have the whole.

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tutes of Dis-
tribution.

But if, although there be no child, yet there hath been a child, and such child deceased hath left any child or other descendent, then such representative of the child deceased shall receive the whole, in exclusion of the father.

8. If the deceased leaveth *neither wife nor child (nor representative of such child as aforesaid), nor father, but a mother living*, the same also is out of the custom; and by the statute of the 1 Jac. 2, c. 17, every brother and sister, and the representatives of them, shall have an equal share with the mother; if there be no brother nor sister, nor representative of any of them, then by the statute of distribution the mother shall have the whole as next of kindred.

9. If the deceased leaveth *neither wife nor child (nor representative of such child as aforesaid), nor father nor mother, but leaveth brothers and sisters and children of other brothers and sisters deceased*, this case is also out of the custom; and by the statute the brothers and sisters, and the children of the brothers and sisters deceased, shall take *per stirpes* and not *per capita*; for the children of the deceased being not equal in degree with their uncles and aunts, do take in this case, not in their own right, but by way of representation of their parents deceased.

10. But if a person dieth intestate, leaving *neither wife nor child (nor representative of such child as aforesaid), nor father nor mother, nor brother nor sister, but children of brothers and sisters*, in this case by the statute they shall all take equally *per capita* and not *per stirpes*, because they do not come in by the right of representation, but all as next of kindred in equal degree.

11. If a person dieth intestate, leaving *neither wife nor child, nor representative of such child, nor father nor mother, nor brother nor sister, nor representative of brother or sister, but hath a grandfather or grandmother living*, such grandfather or grandmother shall come in before uncles and aunts by the statute, as next of kindred to the deceased.

12. If a person dieth intestate, leaving *neither wife, nor child, nor representative of such child, nor father nor mother, nor brother nor sister, nor representatives of brother or sister, nor grandfather nor grandmother, but uncles or aunts, and children of uncles or aunts deceased*, these children are amongst collaterals, and out of the statute in the right of representation, and shall take nothing; but the surviving uncles and aunts shall have the whole as next of kindred.

13. If a person dieth intestate, leaving *none of these rela-*

Construction
of the Sta-
tutes of Dis-
tribution.

The Law of
Scotland as
to Distribu-
tion, and as
to the Power
of making a
Will.

As to Heir
at Law.

tions, the general rule by the statute is, that the same shall go to the next of kindred in equal degree.

14. If such person hath *no kindred*, it is out both of the custom and the statute, and the same shall escheat to the king or to the lord of the manor or other to whom the king hath granted it; for where no person can claim any property, there the king shall be entitled by his prerogative.

Finally, to all that hath been said upon this abstruse subject, it may afford some light to set forth what is the law of Scotland in this particular, especially as the whole kingdom of Scotland, when this custom of the province of York took place, was within and a part of that province. Now the law of Scotland with regard to wills continues to this day as it was in England within the said province before the statute of the 4 Will. 3, c. 2, viz. that the widow and children shall have a portion out of the personalty, which the husband or father cannot devise from them, and which in both places alike the law still gives to them in case of intestacy. And the general proportions are the same in both places, only there is some difference in distributing the children's portion amongst themselves, wherein the Scotch regulations incline more to the principle of equality, agreeable to what is one of the chief objects of our statute of distribution. Briefly, the law of Scotland is this:—If a man dies, leaving a widow and no child, his whole clear personal estate, otherwise called *free gear*, divides into two; one-half goes to the widow, the other is the *dead's part*, that is, the absolute property of the deceased of which he can make his will, and which falls to his next of kin if he dies intestate. Where he leaves a child or children, but no widow, the children get one-half of their *legitime*, legal portion, or *bairns' part of gear*; the other half is the dead's part, which falls also to the children if he has not otherwise disposed of it by his will. If he leaves both widow and children, the division is tripartite; the wife takes one-third by herself; another falls to the children, and the remaining third is the dead's part. If he leaves neither wife nor child, the goods suffer no division, but all is the dead's part.

Hitherto the customs agree. But in dividing the children's portion amongst themselves, there is a difference; for whereas by the custom of the province of York, the heir at law, if his inheritance be never so small, is excluded from any share of the filial portion; on the contrary, in Scotland, if the heir finds it his interest to renounce his exclusive claim to the inheritance, and betake himself to his share amongst the rest of the children, he may collate or communicate the inheritance with the other children, who in that case must collate the children's portion with him, so that the whole is thrown into one mass, and divided *in capita* amongst all of them. Upon which ground, if there is only one child, who is heir at law, he shall

receive the children's portion, because the law admits him to come in where there are other children, on collating his inheritance.

Construction of the Statutes of Distribution.

And for the like reason, Swinburne's notion of *advancement*, namely, that it shall be deemed either a full advancement, or else no advancement at all, so as to entitle a child either to an entire distributive share, or else wholly to exclude him, can here have no place. But in order to preserve an equality, a child who has received a provision from his father, be it more or less, shall be admitted, if he thinks it for his interest, to cast his provision into hotchpot, and receive his proportionable share of the dividend with the other children.

Law of Scotland as to Heir at Law.

But if from the deed of provision the father's intention shall evidently appear to continue the receiver as a *bairn in the house*, the provision is interpreted to be granted as a *præcipuum*, without the necessity of collation. So also a child is not obliged to collate an estate in lands given to him by his father, because the children's portion is not impaired by such provision.

But no filial portion is due to children *foris-familiated*, that is, to such as, by having renounced the filial portion, are no longer considered as *bairns of the family*, and so are excluded from any farther share of the personal estate than they have already received. But as the right of legitime, or children's portion, is strongly founded in nature, the renunciation of it is not to be inferred by implication, neither by the child's carrying on an employment by himself, nor by marriage, nor even by his accepting a provision from his father, unless it specially bear to be in satisfaction of his filial portion.

Children foris-familiated,

If he has renounced his share of the filial portion, it has the same effect in favour of the other children entitled thereto as if he were dead, and consequently, the share of the renouncer divides amongst the rest; but he does not thereby lose his right to the dead's part, if he does not renounce his share in that likewise; nay, his renunciation of the filial portion, where he is the only younger child, has the effect to convert the whole subject thereof into dead's part, which will therefore fall to the renouncer himself as next of kin, if the heir be not willing to collate the inheritance with him.

Also, no legitime is due to grandchildren upon the death of their grandfather, perhaps because the immediate father is presumed to have already received his just share out of the effects of the deceased.

Grandchildren.

And this collation, or bringing into hotchpot, takes place only amongst children; so that the widow is not obliged to collate any thing that hath been given to her by her husband, in order to increase the children's portion; as, on the other hand, the children are not obliged to collate their provisions in order to increase her share.

In Scotland, the Widow.

Construction
of the Statutes
of Distribu-
tion.

The Dead-
Man's Part.

Payment of
Debts.

With regard to the dead-man's testamentary part, where he makes a will, and therein appoints an executor, and doth not otherwise dispose of the said testamentary part; if the executor nominated be a stranger, that is, one who has no legal interest in the personal estate, he is merely a trustee, accountable to the next of kin, but he may retain a third of the dead's part for his trouble in executing the testament; in payment of which, any legacy that is left to him must be computed. The heir, in like case, if he be named executor, has right to the third as a stranger. But if one be named who has an interest in the personalty, he has no allowance unless such interest be less than a third.

As to the payment of debts, there are some which are called *privileged* debts, because they are preferable in payment to any other. Under which name are comprehended: medicines furnished to the deceased on his death-bed; physicians' fees in that period; funeral charges, which include whatever is necessary for the decent performance of the funeral; the rent of his house: and his servants' wages for the year or term current at his death. As to the rest, all creditors who shall, within six months after the death of the debtor, enter a legal claim, shall be preferred *pari passu* with those who have done more early diligence; which prevents collusion, and confessing of judgments in favour of some creditors, and to the exclusion of others (*x*).

3. *Of the Custom within the Principality of Wales.*

By the 27 Hen. 8, c. 26, whereby lands and other hereditaments within the principality and dominion of Wales, were made to be inheritable after the manner of the English tenure, it is provided nevertheless, that "lands, tenements and hereditaments, lying within the said principality and dominion, which have been used time out of mind by the laudable customs of the country, to be departed and departable amongst issues and heirs male, shall so continue and be used, in like form, fashion and condition, as if this act had never been made."

And this is to be understood, as it seemeth, of the lands in those parts of Wales where the Conqueror never came.

But by the 34 & 35 Hen. 8, c. 26, "All lands, tenements, and hereditaments within the dominion of Wales, shall be taken, used and holden as English tenure, to all intents, according to the common laws of England, and shall not be partable among heirs male after the custom of *gavelkind*, as heretofore in divers parts of Wales hath been used and accustomed." In like manner as *gavelkind* lands in Kent had been disgavelled by the statute of the 31 Hen. 8, c. 3, and a private statute made in the 2 & 3 Edw. 6.

(*x*) Erskine's Law of Scotland, book iii. tit. 9.

And by the 7 & 8 Will. 3, c. 38, s. 1, it is enacted as followeth :
 “Whereas in several counties and places within the principality of Wales and marches thereof, the widows and younger children of persons dying inhabitants therein have often claimed and pretended to be entitled to a part of the goods and chattels of their late husbands or fathers, called their *reasonable part*, by virtue of a custom or other usage, notwithstanding any disposition of the same by their husbands and fathers last wills and testaments, or by deed in their lifetime, and notwithstanding a competent jointure made for the livelihood of the said widows, whereby great troubles, disputes and expenses concerning such custom have been occasioned ; for remedy thereof it is enacted, that it shall be lawful for any person inhabiting or residing, or who shall have any goods or chattels within the principality of Wales, or the marches thereof, by their last wills and testaments, to give, bequeath and dispose of all and singular their goods, chattels, debts and other personal estate to their executors, or to such other persons as they shall think fit, in as large and ample a manner as by the laws and statutes of this realm any person may give and dispose of the same within any other part of the province of Canterbury or elsewhere ; and that the widows, children, and other the kindred of such testator, shall be barred to claim or demand any part of the goods, chattels or other personal estate of such testator, in any other manner than as by the said last wills and testaments is limited and appointed, any law, statute, custom, or usage to the contrary notwithstanding.”

Construction
of the Statutes
of Distribu-
tion.

[Foreign domicile ; on this subject, *vide supra*, p. 243.

[Concerning the stamp duties chargeable on legacies, and the distributive share of an intestate's estate, *vide ante*, p. 340.—ED.]

IX. Account (y).

It is for the most part every where within this realm observed, that the executors promise to the ordinary by their oath, to make a true and perfect account whensoever they shall be thereunto called by the said ordinary (z).

Executor's
Oath to ac-
count.

By the statute of the 22 & 23 Car. 2, c. 10, “The administrator shall give bond to make or cause to be made a true and just account of his administration, at a day in such bond to be expressed ; and all the residue of the goods, chattels and credits which shall be found and remaining upon the said administrator's account, the same being first examined and allowed of by the ecclesiastical judge or judges for the time being, to deliver and pay unto such person or persons respectively, as

Administra-
tor's Bond to
account.

(y) [*Vide supra*, “Inventory.”] (z) Swin. 466, 467.

Construction
of the Sta-
tutes of Dis-
tribution.

Before whom
the Account
shall be.

Ordinary's
Power to
compel the
Executor to
account.

Ordinary's
Power to
compel the
Administra-
tor.

the said judge or judges by his or their decree or sentence shall limit and appoint."

An account must be passed before the same judge, or his surrogate or successor, that grants the administration (a).

Dr. Swinburne says (b), albeit it seemeth that the executor is not tied to make an account to the *legataries* or *creditors* extrajudicially, yet he supposeth that at the instance or promotion of such legataries and creditors, he may be compelled to render an account to the ordinary judicially.

But that an *executor* may exact an account of his co-executor extrajudicially, but not in judgment, that is, in the spiritual court; but the ordinary may call them both, or either of them, to a judicial account (c).

By the statute of the 31 Edw. 3, st. 1, c. 11, "In case where a man dieth intestate, the ordinary shall depute the next and most lawful friends of the deceased person to administer his goods; which deputies shall have an action to demand and recover as executors the debts due to the person intestate in the king's court, for to administer and dispend for the soul of the dead; and shall answer also in the king's court to other to whom the said dead person was holden and bound, in the same manner as executors shall answer. And they shall be accountable to the ordinaries, as executors be in the case of testament, as well of the time past as the time to come."

And by the statute of the 22 & 23 Car. 2, c. 10, "The ordinaries shall and may proceed and call administrators to account for and touching the goods of any person dying intestate; and upon hearing and due consideration thereof, order and make just and equal distribution of what remaineth clear (after all debts, funerals, and just expenses of every sort first allowed and deducted); and the same distributions decree and settle, and compel such administrators to observe and pay the same by the due course of his majesty's ecclesiastical laws: saving to every one supposing him or themselves aggrieved their right of appeal, as was always in such cases used."

But by the statute of the 1 Jac. 2, c. 17, s. 6, it is provided, "that no administrator shall be cited according to the said act of the 22 & 23 Car. 2, c. 10, to render an account of the personal estate of his intestate (otherwise than by an inventory or inventories thereof) unless it be at the instance or prosecution of some person in behalf of a minor, or having a demand out of such personal estate as a creditor or next of kin, nor be compellable to account before any the ordinaries or judges by the said act empowered and appointed to take the same, otherwise than as is aforesaid, any thing in the said act to the contrary notwithstanding."

(a) Floy. 37. (By Dr. Bettesworth.)

(b) Swin. 466.

(c) Ibid.

The creditors to whom the testator did owe any thing, and the legataries to whom the testator did bequeath any thing, and all others having interest, are to be cited to be present at the making of the account; otherwise the account made in their absence, and they never called, is not prejudicial unto them (*d*).

Construction
of the Sta-
tutes of Dis-
tribution.

Parties inte-
rested to have
Notice.

And forasmuch as proofs made upon the account at the instance of some one or more persons having interest do not bind others who are no parties to the suit; therefore, to prevent multiplicity of actions, it behoveth the executor or administrator, when he is cited by any one of the parties to render an account, to cite the next of kindred in special, and all others in general, having or pretending to have interest in the goods of the deceased, to be present if they think fit at the rendering and passing of the account. And then, upon their appearance, or contempt in not appearing, the judge will proceed to give sentence, and the account thus determined will be final. And this is expedient to be done, whether at the instance of any party or not; because the witnesses otherwise might be dead before calling for the account; and hereby the executors or administrators of the accountant are freed from giving any further account, which they might not be so well able to do, because they are not supposed to have been privy to the receipts and disbursements of their testator or intestate (*e*).

If any person having interest (as, for instance, the son of the deceased, a legatary, creditor, or the like) shall call the executor or administrator to exhibit a true, full, and perfect inventory of the goods of the deceased which have come to his hands, and to give an account of his administration thereof; he who is called in such case is bound personally to exhibit such inventory and account, and (if the adverse party demand it) to take a corporal oath of the truth thereof; notwithstanding that at another time perhaps an inventory hath been exhibited *ex officio mero* of the judge, and in the absence of the party, and an account given upon oath (*f*).

Manner of
passing the
Account.

And this inventory is not to be exhibited under protestation (as when an inventory is exhibited in common form, and not at the instance of the party), but absolutely and directly, for a full, true, and perfect inventory of all and every the goods of the deceased which have come to the said accountant's hands since the death of the deceased. And if he shall exhibit a false or imperfect inventory or account upon his said oath, he shall be guilty of perjury (*g*).

And the adverse party shall be at liberty to disprove or object against such inventory and account (*h*).

(*d*) Swin. 468.

(*e*) 1 Ought. 354—6.

(*f*) Ibid.

(*g*) Ibid. 346.

(*h*) Ibid. 347.

Construction
of the Sta-
tutes of Dis-
tribution.

And he shall make due proof of every payment, that is to say, of lesser sums by his oath, and of greater sums by other proofs, such as the ordinary shall allow (*i*).

Particularly for sums under 40s. his own general oath as aforesaid shall be allowed as sufficient, provided that there shall appear no falsehood, or fraudulent division of sums; for sometimes accountants (knowing that all such small sums will be allowed to them upon their said oath) will divide greater sums into less. But if there appear no fraud, such small sums shall be allowed to them as aforesaid to avoid expenses in proving the same, and because it is presumed that the accountant will not forswear himself for obtaining the allowance of such little matters (*k*).

But after the death of the executors or administrators, such lesser sums as aforesaid shall not be allowed upon the oath of their executors or administrators; for this can only be done on the oath of those who laid out the money (*l*).

[In *Younge v. Skelton* (*m*), Sir John Nicholl laid down at length the manner of proceeding in a suit of this description. He observed—

[“This is a case of considerable importance in respect to the practice of the court and the interest and convenience of suitors. If from the rare occurrence of such cases, more especially in modern times, some difficulty should have arisen and some errors and irregularities have taken place, no blame attaches to any party, though it is most desirable that a correct mode of proceeding should be established as a precedent for future cases.

[“The present is a suit for an inventory and account, and to make distribution, brought by a party in distribution against an administrator. In such a case the form of proceeding (when rightly understood) is plain and simple, and might afford a very convenient and expeditious mode of attaining justice; but if errors and difficulties are interposed, parties may be induced or driven to resort to other jurisdictions.

[“The statute of distributions (22 & 23 Car. 2, c. 10), which is the only authority under which the court now acts, provides in the first three sections, that ordinaries who have power to grant administrations shall take bond with two or more able sureties; it then sets forth the form and condition of such bond, and enacts, that ordinaries shall have power to call administrators to account, and to make distribution of the residue among the parties entitled. Under the provisions contained in these sections, the administrator is to perform and to give bond with sureties for performing the following matters:

[“1st. To exhibit a true and perfect inventory.

(*i*) Swin. 407.

(*k*) 1 Ought. 347, 348.

(*l*) 1 Ought. 347.

(*m*) [3 Hagg. 782.]

[“ 2d. To administer the effects, that is, to collect the assets and pay the demands and expenses.

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of the Sta-
tutes of Dis-
tribution.

[“ 3d. To exhibit the account of his administration.

[“ 4th. To pay the balance, found remaining after the accounts have been examined and allowed by the court, to such persons as the court shall assign as entitled in distribution.

[“ 5th. To deliver up the administration if a will shall appear.

[“ These are the five conditions under which the bond is given, and on the performance of which the bond is satisfied.

[“ The statute further enacts in sect. 8, that no distribution shall be ordered till after the expiration of twelve months from the intestate's death. This provision is for the purpose of affording an opportunity to creditors to recover their debts, and to the administrator to collect the property and to discharge all claims thereon. The mode of proceeding under this statute is obvious and plain, if the statute itself and the terms of the bond are duly attended to. The mode of calling for an inventory and account is so much a matter of every day's practice that it need not be particularly described. It may be proper, however, to consider what is to be done if they are called for by a party in distribution who means to proceed to enforce distribution. Objections may be taken to the inventory and to the account. In that case the objections must be stated in an allegation, and proof be given thereof; or the party may proceed by petition and affidavit, till the court decides that the inventory and account are sufficient and allows them: but if the inventory and account are not objected to, the administrator prays they may be admitted and allowed, which prayer the court accordingly grants.

[“ The inventory and account, then, not being objected to, or after objection been allowed, what is the next step? To refer them to the registrar to examine and report what is the residue or balance remaining to be distributed according to the statute, and to allot portions; that is, to report what is the share of each person in distribution, previously deducting all necessary costs and expenses which ought to be first paid.

[“ The registrar's report is of course open to objections but when confirmed by the court the next step is to assign the administrator to pay to each person, reported to be entitled, the share which has thus been limited and appointed, and to enforce that payment by the compulsory process of the court, unless sufficient cause be shown against enforcing its order. The administrator and his sureties ought to obey that order, but their bond cannot be put in force against the sureties in this jurisdiction.

[“ This, I apprehend, would be the regular course of proceeding and its several stages in any ordinary case: it seems quite plain and obvious; and, as far as I have been able to as-

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of the Sta-
tutes of Dis-
tribution.

certain from considering the statute and from looking through the cases, it was the old mode. Special circumstances may however arise in each of these stages. The inventory may be objected to—that property has not been entered; the account may be objected to—that payments have been made or debts entered which are not properly to be charged against the estate. The right of the party as being in distribution may be denied. The registrar's report may be objected to; the liability of the administrator may be denied: but whatever circumstance of that kind may occur the objection should be taken at the proper stage. Injury may be done to the other party by interposing the objection prematurely, or the party may defeat himself by irregularity; and it is always the duty of the court, in case the matter falls under its notice, to prevent irregularity for the sake of other suitors."

[In this case there was a suit for inventory and account and to make distribution, on application that an administration bond should be pronounced forfeited, on the ground of a *devastavit* by the administrator's appropriating the property to his own use, and that the bond might be delivered out of the registry in order to be put in suit against the sureties, the court (a declaration instead of the inventory and account being allowed) referred to the registrar to report what residue remained to be distributed, and to allot portions; and on such report (which was not objected to) assigned the administrator to pay to each distributee his respective share, and, the administrator alleging that he had become bankrupt and obtained his certificate, directed the bond to be attended with, but declined to pronounce it forfeited (o).—ED.]

Expenses to
be allowed.

The executor or administrator shall be allowed all reasonable expenses, as well in lawsuits as for other honest purposes; and this reasonableness of expenses to be such as that he may receive thereby neither profit nor loss (p).

And therefore he shall be allowed his expenses in secular courts over and above such costs as were allowed there (q).

Money lost.

Where an executor puts out money upon a real security,

(o) [See also *Brogden v. Brown*, 2 Add. 336; *Butler v. Butler*, 2 Phill. 37; *Watson v. Milwood*, 2 Lee, 332; *Winchlow v. Smith*, 1 Lee, 416; *Kenny v. Jackson*, 1 Hagg. 106; *Hackman v. Black*, 2 Lee, 252; *Brotherton v. Hellier*, ib. 131; *Hendren v. Shaw*, 1 Lee, 51; *Saville v. Morgan*, ib. 431; *Allen v. Allen*, 2 Lee, 244; *Pitt v. Woodham*, 1 Hagg. 250; *Hunter v. Byron*, 2 Add. 311; *Gale v. Luttrell*, ib. 234; *Myddleton v. Rushout*, 1 Phill. 247; *Phillips v. Bignall*, ib. 239; *Lascelles v. Jobber*, 1 Lee, 443; *Bosworth v. Craddock*, ib. 337; *Brown v. Atkins*, 2 Lee, 1; *Telford v. Morrison*, 2 Add. 319; *Reeves v. Freeling*, 2 Phill. 56; *Griffiths and Trinder v. Bennet and Taylor*, ib. 364; *Roberts v. Roberts*, 2 Lee, 399, and other cases collected above under the title "*Inventory*," relating to the practice and jurisdiction of Courts of Probate, in suits for an inventory and account.—ED.]

(p) Lind. 178.

(q) Floy. 37.

which at that time there was no reason to object to, and afterwards such security proves bad, he shall not be accountable for the loss (*r*).

So if the executor pay the assets into the hands of a banker, his co-executor, whom the testator used to intrust with his money, after which the banker fails, the executor shall not be chargeable with the loss (*s*).

Rowth v. Howell (*t*). In this case the testator directed his executors with all convenient speed to pay his debts, and lay out the residue of his property in mortgages. They entered into a treaty for a mortgage, which was delayed by difficulties as to the title. In the mean time the testator's banker sold some negotiable securities deposited with him by the testator, and afterwards became bankrupt. Executors were held not to be answerable. Discharge.

After due examination of the account as aforesaid, the ordinary finding the same to be true and perfect, may pronounce for the validity thereof; and the executor or administrator ought to be acquitted and discharged from further molestation and suits; neither ought they to be called by the ordinary to any further account (*u*).

And by the statute of the 1 Ed. 6, c. 2, "All acquittances of and upon accounts made by the executors, administrators, or collectors of goods of any dead person, shall be made in the name and with the style of the king, as it is in writs original or judicial at the common law; and the test thereof shall be in the name of the archbishop or bishop or other having ecclesiastical jurisdiction." Costs.

A party praying an account, having an interest, is not to be condemned in costs, unless he object thereto, and fails in his proof (*x*).

[As to whether the administration bond shall be put in suit for debts not paid, *vide supra*, "*Administration (Bond)*." —ED.]

(*r*) *Brown v. Litton*, 1 P. Wms. 141.

(*s*) *Churchill v. Hobson and others*, 1 P. Wms. 241.

(*t*) 3 Ves. 565.

(*u*) Swin. 469.

(*x*) Floy. 38.

Form of an Inventory.

A true and perfect inventory of all the goods, chattels, and personal estate of A. B., late of C., in the county of —, and diocese of —, yeoman, deceased, made by us whose names are hereunto subscribed, the — day of —, in the year of our Lord —.

	£	s.	d.
<i>His purse and apparel</i>	15	0	0
<i>Horses and furniture</i>	20	0	0
<i>Horned cattle</i>	27	0	0
<i>Sheep</i>	20	0	0
<i>Swine</i>	0	13	0
<i>Poultry</i>	0	2	4
<i>Plate and other household goods</i>	18	0	0
<i>One lease of, &c.</i>	30	0	0
<i>Rent in arrear</i>	25	0	0
<i>Corn growing at the time of his death</i>	12	0	0
<i>Hay and corn</i>	10	0	0
<i>Ploughs and other implements of husbandry ...</i>	6	10	0
<i>Debts</i>	100	0	0
<i>Total</i>	284	6	4

Other debts, supposed to be desperate 25 2 6
Debts owing by the deceased 250l.

*Appraised by us, the day and
year above written,*

A. B.

C. D.

Form of a Will of Lands and Goods (y)

[since Jan. 1, 1838.]

In the name of God, Amen. I, A. B., of —, Esquire, do make and declare this my last will and testament in manner following.

First, I give and devise to my younger son, B. B., all that my whole freehold messuage and tenement, situate, lying, and being at —, to

(y) [Vide supra, 226, 268.—ED.]

have and to hold to my said son, B. B., his heirs and assigns for ever.

Also, I give and devise all that my messuage and tenement, with the appurtenances, situate, lying, and being at —, unto my daughter, C. B., to have and to hold to my said daughter, C. B., and her assigns, for and during the term of her natural life, without impeachment of waste; and from and immediately after her decease I give and devise the same unto my said son, B. B., and the heirs of his body lawfully to be begotten; and for default of such heirs, then to my own right heirs for ever.

Also, I give and devise to my grandson, E. G., all that my messuage and tenement, with the appurtenances, situate, lying, and being at —, commonly called — tenement, to have and to hold (subject, nevertheless, to and charged and chargeable with the annuity, yearly rent, or sum of —, hereinafter mentioned) to him the said E. G., his heirs and assigns for ever. And I do hereby give, devise, and bequeath unto my wife, E. B., and her assigns, for and during the term of her natural life, one annuity or clear yearly rent or sum of 60*l.* of lawful money of Great Britain, free of all taxes and other deductions, parliamentary or otherwise, to be issuing and payable out of the said messuage and tenement, and to be paid and payable by equal half-yearly payments, at the feast of the annunciation of the blessed Virgin Mary, and of St. Michael the Archangel; the first payment thereof to be on such of the same feasts as shall first and next happen after my decease; and I do hereby charge and subject the said messuage and tenement to and with the payment of the said annuity, yearly rent, or sum of 60*l.* accordingly. And my will is, that in case the said annuity, or any part thereof, shall be behind or unpaid by the space of twenty days next after either of the aforesaid feasts, whereon the same is hereinbefore directed to be paid as aforesaid (being lawfully demanded), that then and so often it shall and may be lawful for my said wife and her assigns to enter upon the said premises charged with the said annuity as aforesaid, and distrain for the same, or for so much thereof as shall be so in arrear; and the distress and distresses then and there found to detain and keep until she shall be fully paid and satisfied all such arrearages, with costs and charges in and about the making and keeping thereof. And in case the said annuity, or any part thereof, shall be behind and unpaid by the space of forty days next after any of the said days of payment, whereon the same ought to be paid as aforesaid, that then and so often it shall and may be lawful for my said wife and her assigns into all and singular the premises

charged with the said annuity-as aforesaid to enter, and the rents, issues, and profits thereof to receive and take, until she be therewith and thereby, or by the person or persons who shall be then entitled to the immediate possession of the premises, paid and satisfied the same and every part thereof, and all the arrears thereof incurred before, and that shall incur during such time as she shall receive the rents, issues, and profits thereof, or be entitled to receive the same by virtue of such entry to be made as aforesaid, together with her costs, damages, and expenses laid out and sustained by reason of the nonpayment thereof, or any part thereof.

Also, I give and devise unto D. F. all that my messuage and tene-ment, with the appurtenances, which I hold by or under a lease from —, and all my estate, right, title, term, and interest of and in the same premises, with the appurtenances, to have and to hold to him the said D. F., his executors, administrators, and assigns, to and for his and their own use and benefit.

Also, I will and ordain, that the executor of this my last will and testament, or his executor or executors, for and towards the performance of my said testament, shall, with all convenient speed after my decease, bargain, sell, and alien in fee-simple all those my lands called —; for the doing, executing, and perfect finishing whereof, I do by these presents give to my said executor, and his executor or executors, full power and authority to grant, alien, bargain, sell, convey, and assure all the same lands called — to any person or persons, and their heirs for ever in fee-simple, by all and every such lawful ways and means in the law, as to my said executor, or his executor or executors, or to his or their counsel learned in the law, shall seem fit or necessary.

And I do hereby appoint my trusty friend, E. E., executor of this my last will and testament, and do give unto him the sum of — in consideration of the pains and trouble he will have in the execution of this my will.

Also, I give unto P. Q. of — the sum of one hundred pounds.

Also, I give unto R. S. of — the like sum of one hundred pounds.

Also, for the better education of my children, A. B. and C., I do give and dispose of my tuition and custody of them, and every of them, unto my wife, E. G., for such time as they on any of them respectively continue unmarried and under the age of one-and-twenty years, and my said wife remains my widow; but if my said wife should die or marry,

during the single life and nonage of any of my said children, then I give the custody and tuition of such of my children, so being unmarried and under the age of one-and-twenty years at the marriage or death of my wife, unto my said executor, E. E.

Also, I do hereby authorize, empower, and direct my said executor, and his executor or executors, from and after my decease until the aforesaid E. G. shall attain his age of one-and-twenty years, to manage and improve the estate and fortune of him the said E. G., by me hereby given him, for his use and benefit; and to lease all or any part of his freehold, copyhold, or leasehold estates, and to lend and place out upon security or securities at interest, or otherwise improve according to his or their discretion or discretions, all or any part of the monies belonging to or arising from the said estates and fortune of the said E. G., and to pay unto and account with him, the said E. G., for all such rents, interests, produce and improvements, as shall arise from, or be made of, and produced by the said estates, monies, and fortune hereby given and devised to him, when he shall attain his age of one-and-twenty years.

And my will is, and I do hereby expressly declare, that my said executor, his executor or executors, shall not be charged or chargeable with or accountable for more of the aforesaid monies and estates, than he or they shall actually receive, or shall come to his or their respective hands by virtue of this my will, nor with or for any loss which shall happen of the said monies or estate hereby by me given to the said E. G. or of any of the aforesaid sums to me bequeathed, or of any part of my personal estate: so as such loss happen without his or their wilful default and neglect.

And also that it shall and may be lawful, for him my said executor, and his executor or executors, in the first place, out of the said premises respectively, and out of the residue of my personal estate, to deduct and reimburse him and themselves respectively, all such loss, costs, charges, and expenses, as he or they shall sustain, expend or be put unto, for or by reason of the performance of this my will, or the management or execution thereof respectively, or any other thing in anywise relating thereunto.

And finally; all the rest, residue, and remainder of all my estate and effects, real and personal whatsoever, and wheresoever, not hereinbefore otherwise effectually disposed of (after payment of my debts,

legacies, and funeral expenses, and other charges and deductions as aforesaid), I do give, devise, and bequeath unto my eldest son, A. B.

In witness whereof I have hereunto set my hand and seal, the — day of — in the year of our Lord —.

A. B.

Signed, declared, and published, as and for his last will and testament, in the presence of us who subscribed our names as witnesses in the testator's presence, and at his request.

C. D.

E. F.

Codicil.

Whereas I, A. B., of — have made and duly executed my last will and testament in writing, bearing date —, now I do hereby declare this present writing to be as a codicil to my said will, and direct the same to be annexed thereto, and taken as part thereof: And I do hereby give and bequeath to C. D. of — the sum of —. And whereas by my said will I did give and bequeath unto E. E. the sum of —, now I do hereby revoke the said legacy, and do give unto him, the said E. F., the sum of — and no more. In witness whereof I the said A. B. have to this codicil set my hand and seal the — day of — in the year of our Lord —.

A. B.

Signed, declared, and published, as and for a codicil, to be annexed to his last will and testament, and to be taken as part thereof, in the presence of

C. D.

E. F.

Precedents of long entails, and remainders, and contingencies, and limitations, are here purposely omitted; not only because they are above the author's skill (for this he could have supplied from books of acknowledged reputation), but also and chiefly because they ought to be drawn *pro re natâ*, and by the advice of counsel learned in the law. For although the law favours wills, yet it is when wills favour the law.

The common law abhors a perpetuity; and the reason is, because if one person might indefeasibly limit his estate, so also might other, and consequently by the same rule the present generation might dispose of all the lands in the kingdom for ever; which would be full of intolerable inconvenience: and therefore the law interferes, and herein checks the vanity and pride of man. And whoever shall examine the reports of cases adjudged in the High Court of Chancery, will observe that scarcely any thing creates to the courts of equity so much trouble as long entails, vainly imagined to perpetuate names and families; which, although generally drawn by the ablest advice, yet always meet with discouragement and contradiction. For they are struggles against the bent and inclination of the law: and we may add also, against the course of Providence; which, from its effects and appearances, doth not seem to intend that any thing here should be perpetual.

[**Witnesses**—See “*Evidence*,” under title **Practice**.]

Woollen, burying in—See **Burial**.

[**Witchcraft**—See **Physicians**.]

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APPENDIX I.

Articles of Religion.

HIS MAJESTY'S (a) DECLARATION.

BEING by God's ordinance, according to Our just Title, Defender of the Faith, and Supreme Governour of the Church, within these our Dominions, We hold it most agreeable to this our Kingly Office, and Our own Religious Zeal, to conserve and maintain the Church committed to Our Charge, in the unity of true Religion, and in the bond of Peace : and not to suffer unnecessary Disputations, Altercations, or Questions to be raised, which may nourish Faction both in the Church and Commonwealth. We have therefore upon mature deliberation, and with the Advice of so many of our Bishops as might conveniently be called together, thought fit to make this Declaration following.

That the Articles of the Church of England (which have been allowed and authorized heretofore, and which Our Clergy generally have subscribed unto) do contain the true Doctrine of the Church of England, agreeable to God's Word : which We do therefore ratify and confirm, requiring all Our loving subjects to continue in the uniform profession thereof, and prohibiting the least difference from the said Articles, which to that end We command to be new Printed, and this Our Declaration to be published therewith.

That We are supreme Governour of the Church of England : And that if any difference arise about the external Policy concerning Injunctions, Canons, and other Constitutions whatsoever thereto belonging, the Clergy in their Convocation is to order and settle them, having first obtained leave under Our Broad Seal so to do, and We approving their said Ordinances and Constitutions ; providing that none be made contrary to the Laws and Customs of the Land.

That out of Our Princely care, that the Churchmen may do the work which is proper unto them, the Bishops and Clergy from time to time in Convocation, upon their humble desire, shall have Licence under Our Broad Seal, to deliberate of, and to do all such things, as being made plain by them, and assented unto by Us, shall concern the settled continuance of the Doctrine and Discipline of the Church of England now established ; from which We will not endure any varying or departing in the least degree.

That for the present, though some differences have been ill raised, yet We take comfort in this, that all Clergymen within Our Realm, have always most willingly subscribed to the Articles established ; which is an Argument to Us, that they all agree in the true, usual, literal meaning of the said Articles, and that even in those curious Points in which the present Differences lie, men of all sorts take the Articles of the Church of England to be for them ; which is an Argument again, that none of them intend any desertion of the Articles established.

(a) King Charles the First.

That therefore in both these curious and unhappy Differences, which have for so many hundred years, in different Times and Places, exercised the Church of Christ, We will that all further curious search be laid aside, and these Disputes shut up in God's promises, as they be generally set forth to us in the Holy Scriptures, and the general meaning of the Articles of the Church of England according to them. And that no man hereafter shall either Print or Preach to draw the Article aside any way, but shall submit to it in the plain and full meaning thereof; and shall not put his own Sense or Comment to be the meaning of the Article, but shall take it in the Literal and Grammatical Sense.

That if any public Reader in either our Universities, or any Head or Master of a College, or any other person respectively in either of them, shall affix any new Sense to any Article, or shall publicly read, determine or hold any public Disputation, or suffer any such to be held either way, in either the Universities or Colleges respectively; or if any Divine in the Universities shall Preach or Print any thing either way, other than is already established in Convocation with Our Royal Assent; he or they the offenders shall be liable to Our Displeasure, and the Churches Censure in our Commission Ecclesiastical, as well as any other: And We will see there shall be due Execution upon them.

ARTICLES agreed upon by the Archbishops and Bishops of both Provinces, and the whole Clergy, in the Convocation holden at London, in the year 1562. For the avoiding of diversities of Opinions, and for the establishing of consent touching true Religion.

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|---|---|
| 1. Of Faith in the Trinity. | 22. Of Purgatory. |
| 2. Of Christ the Son of God. | 23. Of Ministering in the Congregation. |
| 3. Of his going down into Hell. | 24. Of Speaking in the Congregation. |
| 4. Of his Resurrection. | 25. Of the Sacraments. |
| 5. Of the Holy Ghost. | 26. Of the Worthiness of Ministers. |
| 6. Of the Sufficiency of the Scripture. | 27. Of Baptism. |
| 7. Of the Old Testament. | 28. Of the Lord's Supper. |
| 8. Of the three Creeds. | 29. Of the Wicked, which eat not the
Body of Christ. |
| 9. Of Original Sin. | 30. Of both Kinds. |
| 10. Of Free Will. | 31. Of Christ's one Oblation. |
| 11. Of Justification. | 32. Of the Marriage of Priests. |
| 12. Of Good Works. | 33. Of Excommunicate Persons. |
| 13. Of Works before Justification. | 34. Of the Traditions of the Church. |
| 14. Of Works of Supererogation. | 35. Of Homilies. |
| 15. Of Christ alone without Sin. | 36. Of Consecration of Ministers. |
| 16. Of Sin after Baptism. | 37. Of Civil Magistrates. |
| 17. Of Predestination and Election. | 38. Of Christian Men's Goods. |
| 18. Of obtaining Salvation by Christ. | 39. Of a Christian Man's Oath.
The Ratification. |
| 19. Of the Church. | |
| 20. Of the Authority of the Church. | |
| 21. Of the Authority of General Councils. | |

1. Of Faith in the Holy Trinity.

There is but one living and true God, everlasting, without body, parts or passions; of infinite power, wisdom and goodness, the maker, and preserver of all things both visible and invisible. And in unity of this Godhead, there be three persons of one substance, power and eternity; the Father, the Son, and the Holy Ghost.

2. *Of the Word or Son of God, which was made very man.*

The Son, which is the Word of the Father, begotten from everlasting of the Father, the very and eternal God, of one substance with the Father, took man's nature in the womb of the Blessed Virgin, of her substance: so that two whole and perfect natures, that is to say, the Godhead and manhood, were joined together in one person, never to be divided, whereof is one Christ, very God and very man, who truly suffered, was crucified, dead and buried, to reconcile his Father to us, and to be a sacrifice, not only for original guilt, but also for actual sins of men.

3. *Of the going down of Christ into Hell.*

As Christ died for us, and was buried; so also is it to be believed, that he went down into Hell.

4. *Of the Resurrection of Christ.*

Christ did truly rise again from death, and took again his body, with flesh, bones, and all things appertaining to the perfection of man's nature, wherewith he ascended into heaven, and there sitteth until he return to judge all men at the last day.

5. *Of the Holy Ghost.*

The Holy Ghost, proceeding from the Father and the Son, is of one Substance, Majesty and Glory, with the Father and the Son, very and eternal God.

6. *Of the Sufficiency of the Holy Scriptures for Salvation.*

Holy Scripture containeth all things necessary to salvation: so that whatsoever is not read therein, nor may be proved thereby, is not to be required of any man, that it should be believed as an Article of the Faith, or be thought requisite or necessary to salvation. In the name of the Holy Scripture we do understand those Canonical Books of the Old and New Testament, of whose Authority was never any Doubt in the Church.

Of the Names and Number of the Canonical Books.

Genesis,	The First Book of Chronicles,
Exodus,	The Second Book of Chronicles,
Leviticus,	The First Book of Esdras,
Numeri,	The Second Book of Esdras,
Dueteronomium,	The Book of Hester,
Josue,	The Book of Job,
Judges,	The Psalms,
Ruth,	The Proverbs,
The First Book of Samuel,	Ecclesiastes or Preacher,
The Second Book of Samuel,	Cantica or Songs of Solomon,
The First Book of Kings,	Four Prophets the greater,
The Second Book of Kings,	Twelve Prophets the less.

And the other Books (as Hierome saith) the Church doth read for example of life and instruction of manners; yet doth it not apply them to establish any doctrine: Such are these following.

The Third Book of Esdras,	Baruch the Prophet,
The Fourth Book of Esdras,	The Song of the Three Children,
The Book of Tobias,	The Story of Susanna,
The Book of Judith,	Of Bell and the Dragon,
The rest of the Book of Hester,	The Prayer of Manasses,
The Book of Wisdom,	The First Book of Maccabees,
Jesus the Son of Sirach,	The Second Book of Maccabees.

All the Books of the New Testament, as they are commonly received, we do receive and account them Canonical.

7. *Of the Old Testament.*

The Old Testament is not contrary to the New : for both in the Old and New Testament, everlasting life is offered to mankind by Christ, who is the only Mediator between God and man, being both God and man. Wherefore they are not to be heard, which feign that the Old Fathers did look only for transitory Promises. Although the Law given from God by Moses, as touching Ceremonies and Rites, do not bind Christian men, nor the Civil Precepts thereof ought of necessity to be received in any Commonwealth : yet notwithstanding, no Christian man whatsoever, is free from the obedience of the Commandments which are called Moral.

8. *Of the Three Creeds.*

The three Creeds, Nice Creed, Athanasius's Creed, and that which is commonly called the Apostles' Creed, ought thoroughly to be received and believed : for they may be proved by most certain warrants of Holy Scripture.

9. *Of Original or Birth Sin.*

Original Sin standeth not in the following of Adam (as the Pelagians do vainly talk), but it is the fault and corruption of the nature of every man, that naturally is engendered of the offspring of Adam, whereby man is very far gone from original righteousness, and is of his own nature inclined to evil, so that the flesh lusteth always contrary to the spirit ; and therefore in every person born into this world, it deserveth God's wrath and damnation. And this infection of nature doth remain, yea, in them that are regenerated, whereby the lust of the flesh, called in Greek, *φρόνημα σαρκός*, which some do expound the wisdom, some sensuality, some the affection, some the desire of the flesh, is not subject to the Law of God. And although there is no condemnation for them that believe and are baptized, yet the Apostle doth confess that concupiscence and lust hath of itself the nature of sin.

10. *Of Free Will.*

The condition of man after the fall of Adam, is such, that he cannot turn and prepare himself by his own natural strength and good works to faith and calling upon God : Wherefore we have no power to do good works pleasant and acceptable to God, without the grace of God by Christ preventing us, that we may have a good will, and working with us when we have that good will.

11. *Of the Justification of Man.*

We are accounted righteous before God, only for the merits of our Lord and Saviour Jesus Christ by faith, and not for our own works or deservings. Wherefore, that we are justified by faith only, is a most wholesome doctrine, and very full of comfort, as more largely expressed in the Homily of Justification.

12. *Of Good Works.*

Albeit that good Works, which are the fruits of Faith, and follow after justification, cannot put away our sins, and endure the severity of God's judgment ; yet are they pleasing and acceptable to God in Christ, and do spring out necessarily of a true and lively faith, insomuch that by them a lively faith may be as evidently known, as a tree discerned by the fruit.

13. *Of Works before Justification.*

Works done before the grace of Christ, and the inspiration of his Spirit, are not pleasant to God, forasmuch as they spring not of faith in Jesu Christ, neither do they make men meet to receive grace, or (as the School Authors say) deserve grace of congruity : yea, rather for that they are not done as God hath willed and commanded them to be done, we doubt not but they have the nature of Sin.

14. *Of Works of Supererogation.*

Voluntary Works besides, over and above God's Commandments, which they call Works of Supererogation, cannot be taught without arrogancy and impiety. For by them men do declare, that they do not only render unto God as much as they are bound to do, but that they do more for his sake, than of bounden duty is required: Whereas Christ saith plainly, when ye have done all that are commanded to you, say, we are unprofitable servants.

15. *Of Christ alone without Sin.*

Christ in the truth of our nature, was made like unto us in all things (sin only except) from which he was clearly void, both in his flesh, and in his spirit. He came to be a Lamb without spot, who by sacrifice of himself once made, should take away the sins of the world: and sin (as St. John saith) was not in him. But all we the rest (although baptized and born again in Christ) yet offend in many things, and if we say we have no sin, we deceive ourselves, and the truth is not in us.

16. *Of Sin after Baptism.*

Not every deadly sin willingly committed after Baptism, is sin against the Holy Ghost and unpardonable. Wherefore the grant of repentance is not to be denied to such as fall into sin after Baptism. After we have received the Holy Ghost, we may depart from grace given, and fall into sin, and by the grace of God (we may) arise again, and amend our lives. And therefore they are to be condemned, which say they can no more sin as long as they live here, or deny the place of forgiveness to such as truly repent.

17. *Of Predestination and Election.*

Predestination to life, is the everlasting purpose of God, whereby (before the foundations of the world were laid) he hath constantly decreed by his counsel, secret to us, to deliver from curse and damnation, those whom he hath chosen in Christ out of mankind, and to bring them by Christ to everlasting salvation, as vessels made to honour. Wherefore they which be endued with so excellent a benefit of God, be called according to God's purpose by his spirit working in due season: they through grace obey the calling: they be justified freely: they be made sons of God by adoption: they be made like the image of his only begotten son Jesus Christ: they walk religiously in good works, and at length by God's mercy they attain to everlasting felicity.

As the goodly consideration of Predestination and our Election in Christ, is full of sweet, pleasant, and unspeakable comfort to godly persons, and such as feel in themselves the working of the Spirit of Christ, mortifying the works of the flesh, and their earthly members, and drawing up their mind to high and heavenly things, as well because it doth greatly establish and confirm their faith of eternal salvation, to be enjoyed through Christ, as because it doth fervently kindle their love towards God: So, for curious and carnal persons, lacking the Spirit of Christ, to have continually before their eyes the sentence of God's Predestination, is a most dangerous downfall, whereby the devil doth thrust them either into desperation, or into wretchedness of most unclean living, no less perilous than desperation.

Furthermore, we must receive God's Promises in such wise as they be generally set forth to us in Holy Scripture. And in our doings, that Will of God is to be followed, which we have expressly declared unto us in the Word of God.

18. *Of obtaining Eternal Salvation only by the Name of Christ.*

They also are to be had accursed, that presume to say, that every man shall be saved by the Law or Sect which he professeth, so that he be diligent to frame his life according to that law, and the light of Nature. For Holy Scripture doth set out unto us only the name of Jesus Christ, whereby men must be saved.

19. *Of the Church.*

The Visible Church of Christ is a Congregation of faithful men, in the which the pure word of God is Preached, and the Sacraments be duly ministered, according to Christ's Ordinance, in all those things that of necessity are requisite to the same.

As the Church of Hierusalem, Alexandria, and Antioch have erred, so also the Church of Rome hath erred, not only in their living and manner of Ceremonies, but also in matters of Faith.

20. *Of the Authority of the Church.*

The Church hath power to decree Rites or Ceremonies, and Authority in Controversies of Faith: And yet it is not lawful for the Church to ordain any thing that is contrary to God's Word written, neither may it so Expound one place of Scripture that it be repugnant to another. Wherefore although the Church be a witness and a Keeper of Holy Writ, yet as it ought not to Decree any thing against the same, so besides the same ought it not to enforce any thing to be believed for necessity of Salvation.

21. *Of the Authority of General Councils.*

General Councils may not be gathered together without the Commandment and Will of Princes. And when they be gathered together (forasmuch as they be an Assembly of men, whereof all be not governed with the Spirit and Word of God) they may err, and sometime have erred, even in things pertaining unto God. Wherefore things ordained by them as necessary to salvation, have neither strength nor authority, unless it may be declared that they be taken out of Holy Scripture.

22. *Of Purgatory.*

The Romish Doctrine concerning Purgatory, Pardons, Worshipping and Adoration, as well of Images, as of Reliques, and also Invocation of Saints, is a fond thing, vainly invented, and grounded upon no warrant of Scripture, but rather repugnant to the Word of God.

23. *Of Ministering in the Congregation.*

It is not lawful for any man to take upon him the office of public preaching, or Ministering the Sacraments in the Congregation, before he be lawfully called, and sent to execute the same. And those we ought to judge lawfully called and sent, which be chosen and called to this Work by men who have public authority given unto them in the congregation, to call and send Ministers into the Lord's Vineyard.

24. *Of Speaking in the Congregation in such a Tongue as the People understandeth.*

It is a thing plainly repugnant to the Word of God, and the custom of the Primitive Church, to have public Prayer in the Church, or to Minister the Sacraments in a Tongue not understood of the People.

25. *Of the Sacraments.*

Sacraments ordained of Christ, be not only badges or tokens of Christian men's Profession: but rather they be certain sure Witnesses, and effectual signs of Grace, and God's good will towards us, by the which he doth work invisibly in us, and doth not only quicken, but also strengthen and confirm our faith in him.

There are two Sacraments ordained of Christ our Lord in the Gospel, that is to say, Baptism and the Supper of the Lord.

Those five commonly called Sacraments, that is to say, Confirmation, Penance, Orders, Matrimony, and Extreme Unction, are not to be counted for Sacraments of the Gospel, being such as have grown, partly of the corrupt following of the Apostles, partly are states of life allowed by the

Scriptures: but yet have not like nature of Sacraments with Baptism and the Lord's Supper, for that they have not any visible Sign or Ceremony ordained of God.

The Sacraments were not ordained of Christ to be gazed upon, or to be carried about, but that we should duly use them. And in such only as worthily receive the same, they have a wholesome effect or operation: but they that receive them unworthily, purchase to themselves damnation as St. Paul saith.

26. *Of the Unworthiness of the Ministers, which hinders not the effect of the Sacraments.*

Although in the visible Church the evil be ever mingled with the good, and some time the evil have chief authority in the ministration of the Word and Sacraments: yet forasmuch as they do not the same in their own name, but in Christ's, and do minister by his Commission and Authority, we may use their Ministry, both in hearing the Word of God, and in receiving of the Sacraments. Neither is the effect of Christ's Ordinance taken away by their wickedness, nor the grace of God's gifts diminished from such, as by faith and rightly do receive the Sacraments ministered unto them, which be effectual, because of Christ's Institution and Promise, although they be ministered by evil men.

Nevertheless it appertaineth to the Discipline of the Church, that enquiry be made of evil Ministers, and that they be accused by those that have knowledge of their Offences: and finally being found guilty, by just judgment be deposed.

27. *Of Baptism.*

Baptism is not only a Sign of Profession, and Mark of difference, whereby Christian men are discerned from others that be not Christened: but it is also a Sign of Regeneration or New Birth, whereby, as by an instrument, they that receive Baptism rightly, are grafted into the Church: the promises of the forgiveness of sin, and of our adoption to be the Sons of God by the Holy Ghost are visibly Signed and Sealed: faith is confirmed, and grace increased by virtue of Prayer unto God. The baptism of young Children is in any wise to be retained in the Church, as most agreeable with the Institution of Christ.

28. *Of the Lord's Supper.*

The Supper of the Lord is not only a sign of the Love that Christians ought to have among themselves one to another: but rather it is a Sacrament of our Redemption by Christ's Death: insomuch that to such as rightly, worthily, and with faith receive the same, the Bread which we break, is a partaking of the Body of Christ: and likewise the Cup of Blessing, is a partaking of the Blood of Christ.

Transubstantiation (or the change of the substance of Bread and Wine) in the Supper of the Lord, cannot be proved by Holy Writ: but it is repugnant to the plain words of Scripture, overthroweth the nature of a Sacrament, and hath given occasion to many Superstitions.

The Body of Christ is given, taken, and eaten in the Supper only after an heavenly and Spiritual manner. And the mean whereby the Body of Christ is received and eaten in the Supper is Faith.

The Sacrament of the Lord's Supper was not by Christ's Ordinance preserved, carried about, lifted up, or worshipped.

29. *Of the Wicked, which eat not the Body of Christ in the use of the Lord's Supper.*

The wicked and such as be void of a lively faith, although they do carnally and visibly press with their teeth (as St. Augustine saith) the Sacrament of the Body and Blood of Christ: yet in no wise are they partakers of Christ; but rather to their condemnation do eat and drink the Sign or Sacrament of so great a thing.

30. *Of both Kinds.*

The Cup of the Lord is not to be denied to the lay people: For both the parts of the Lord's Sacrament, by Christ's Ordinance and Commandment, ought to be ministered to all Christian men alike.

31. *Of the one Oblation of Christ finished upon the Cross.*

The offering of Christ once made, is that perfect Redemption, Propitiation, and Satisfaction for all the sins of the whole world, both Original and Actual, and there is none other Satisfaction for sin, but that alone. Wherefore the Sacrifices of Masses, in the which it was commonly said, that the Priest did offer Christ for the quick and the dead, to have remission of pain and guilt, were blasphemous Fables and dangerous Deceits.

32. *Of the Marriage of Priests.*

Bishops, Priests, and Deacons, are not commanded by God's Law, either to vow the Estate of single life, or to abstain from marriage: Therefore it is lawful for them, as for all other Christian men, to Marry at their own discretion, as they shall judge the same to serve better to godliness.

33. *Of Excommunicate Persons, how they are to be avoided.*

That person which by open Denunciation of the Church is rightly cut off from the Unity of the Church, and Excommunicated, ought to be taken, of the whole multitude of the faithful, as an Heathen, and Publican, until he be openly reconciled by Penance, and received into the Church by a judge that hath authority thereunto.

34. *Of the Traditions of the Church.*

It is not necessary that Traditions and Ceremonies be in all places one, or utterly like; for at all times they have been diverse, and may be changed according to the diversity of Countries, Times, and men's Manners, so that nothing be ordained against God's Word. Whosoever, through his private judgment, willingly and purposely doth openly break the Traditions and Ceremonies of the Church, which be not repugnant to the Word of God, and be ordained and approved by Common Authority, ought to be rebuked openly, (that other may fear to do the like,) as he that offendeth against the common Order of the Church, and hurteth the Authority of the Magistrate, and woundeth the Consciences of the weak brethren.

Every particular or National Church, hath authority to ordain, change, and abolish Ceremonies or Rites of the Church, ordained only by man's Authority, so that all things be done to edifying.

35. *Of Homilies.*

The Second Book of Homilies, the several titles whereof we have joined under this Article, doth contain a godly and wholesome Doctrine, and necessary for these Times, as doth the former Book of Homilies, which were set forth in the time of Edward the Sixth; and therefore we judge them to be read in Churches by the Ministers, diligently and distinctly, that they may be understood of the People.

Of the Names of the Homilies.

- 1 Of the right Use of the Church.
- 2 Against Peril of Idolatry.
- 3 Of Repairing and Keeping clean of Churches.
- 4 Of Good Works, first of Fasting.
- 5 Against Gluttony and Drunkenness.
- 6 Against Excess of Apparel.
- 7 Of Prayer.
- 8 Of the Place and Time of Prayer.
- 9 That Common Prayers and Sacraments ought to be Ministered in a known Tongue.

- 10 Of the Reverent Estimation of God's Word.
- 11 Of Alms-doing.
- 12 Of the Nativity of Christ.
- 13 Of the Passion of Christ.
- 14 Of the Resurrection of Christ.
- 15 Of the worthy Receiving of the Sacrament of the Body and Blood of Christ.
- 16 Of the Gifts of the Holy Ghost.
- 17 For the Rogation Days.
- 18 Of the State of Matrimony.
- 19 Of Repentance.
- 20 Against Idleness.
- 21 Against Rebellion.

36. *Of Consecration of Bishops and Ministers.*

The Book of Consecration of Archbishops, and Bishops, and Ordering of Priests and Deacons, lately set forth in the time of Edward the Sixth, and confirmed at the same time by Authority of Parliament, doth contain all things necessary to such Consecration and Ordering: neither hath it any thing that of itself is superstitious and ungodly. And therefore whosoever are Consecrated or Ordered according to the Rites of that Book, since the Second year of the forenamed King Edward, unto this time, or hereafter shall be Consecrated or Ordered according to the same Rites, we decree all such to be rightly, orderly, and lawfully Consecrated and Ordered.

37. *Of the Civil Magistrates.*

The Queen's Majesty hath the chief Power in this realm of England, and other her Dominions, unto whom the chief Government of all Estates of this Realm, whether they be Ecclesiastical or Civil, in all causes doth appertain, and is not, nor ought to be subject to any Foreign jurisdiction.

Where we attribute to the Queen's Majesty the chief Government, by which Titles we understand the minds of some slanderous Folks to be offended: we give not to our Princes the Ministering either of God's Word, or of the Sacraments, the which thing the injunctions also lately set forth by Elizabeth our Queen do most plainly testify: but that only Prerogative which we see to have been given always, to all Godly Princes in Holy Scriptures by God himself, that is, that they should rule all Estates and Degrees committed to their charge by God, whether they be Ecclesiastical or Temporal, and restrain with the Civil Sword the stubborn and evil doers.

The Bishop of Rome hath no jurisdiction in this realm of England.

The Laws of the Realm may punish Christian men with Death for heinous and grievous Offences.

It is lawful for Christian men, at the Commandment of the Magistrate, to wear Weapons, and serve in the Wars.

38. *Of Christian Men's Goods, which are not common.*

The Riches and Goods of Christians are not common, as touching the Right, Title, and Possession of the same, as certain Anabaptists do falsely boast. Notwithstanding, every man ought of such things as he possesseth, liberally to give Alms to the Poor, according to his ability.

39. *Of a Christian Man's Oath.*

As we confess that vain and rash Swearing is forbidden Christian men by our Lord Jesus Christ, and James his Apostle: So we judge that Christian Religion doth not prohibit, but that a man may Swear when the Magistrate requireth in a cause of Faith and Charity, so it be done according to the Prophet's teaching, in Justice, Judgment, and Truth.

Articles.

THE RATIFICATION.

This Book of Articles before rehearsed, is again approved, and allowed to be Holden and Executed within the Realm, by the Assent and Consent of our Sovereign Lady Elizabeth, by the Grace of God of England, France, and Ireland, Queen, Defender of the Faith, &c. Which Articles were deliberately Read and Confirmed again by the Subscription of the Hand of the Archbishop and Bishops of the Upper House, and by the Subscription of the whole Clergy of the Nether House in their Convocation, in the Year of our Lord, 1571.

APPENDIX II.

Constitutions and Canons Ecclesiastical

OF

THE CHURCH OF ENGLAND.

JAMES, by the Grace of God King of England, Scotland, France, and Ireland, Defender of the Faith, &c. To all to whom these Presents shall come, Greeting. Whereas our Bishops, Deans of Our Cathedral Churches, Archdeacons, Chapters and Colleges, and the other Clergy of every Diocese within the Province of Canterbury, being summoned and called by Virtue of Our Writ directed to the most Reverend Father in God, John, late Archbishop of Canterbury, and bearing date the 31st day of January, in the first year of Our Reign of England, France, and Ireland, and of Scotland the thirty-seventh, to have appeared before him in Our Cathedral Church of St. Paul in London, the 20th day of March then next ensuing, or elsewhere, as he should have thought it most convenient, to treat, consent, and conclude upon certain difficult and urgent Affairs mentioned in the said Writ, Did thereupon at the time appointed, and within the Cathedral Church of St. Paul aforesaid, assemble themselves, and appear in Convocation for that purpose, according to Our said Writ, before the Right Reverend Father in God, Richard, Bishop of London, duly (upon a second Writ of Ours, dated the 9th day of March, aforesaid) authorized, appointed and constituted, by reason of the said Archbishop of Canterbury his death, President of the said Convocation, to execute those things which by virtue of Our first Writ, did appertain to him the said Archbishop to have executed if he had lived: We for divers urgent and weighty Causes and Considerations Us thereunto especially moving, of Our especial grace, certain knowledge and mere motion, did by virtue of our Prerogative Royal, and Supreme Authority in Causes Ecclesiastical, give and grant by Our Several Letters Patents under our great Seal of England, the one dated the 12th day of April last past, and the other the 25th day of June then next following, full, free, and lawful liberty, licence, power, and authority unto the said Bishop of London, President of the said Convocation, and to the other Bishops, Deans, Archdeacons, Chapters, and Colleges, and the rest of the Clergy before mentioned of the said Province; That they, from time to time, during Our first Parliament now Prorogued, might confer, treat, debate, consider, consult, and agree of and upon such Canons, Orders, Ordinances and Constitutions, as they should think necessary, fit and convenient for the Honour and Service of Almighty God, the good and quiet of the Church, and the better Government thereof, to be from time to time observed, performed, fulfilled, and kept, as well by the Archbishops of Canterbury, the Bishops and their Successors, and the rest of the whole Clergy of the said Province of Canterbury in their several Callings, Offices, Functions, Ministries, Degrees, and Administrations, as also by all and every Dean of the Arches, and other judge of the said Archbishop's Courts, Guardians of Spi-

Canons.

ritualties, Chancellors, Deans and Chapters, Archdeacons, Commissaries, Officials, Registers, and all and every other Ecclesiastical Officers, and their inferior Ministers whatsoever, of the same Province of Canterbury, in their and every of their distinct Courts, and in the order and manner of their and every of their Proceedings: and by all other Persons within this Realm, as far as lawfully, being Members of the Church, it may concern them, as in Our said Letters Patents amongst other Clauses more at large doth appear. Forasmuch as the Bishop of London, President of the said Convocation, and others the said Bishops, Deans, Archdeacons, Chapters, and Colleges, with the rest of the Clergy, having met together at the time and place before-mentioned, and then and there, by virtue of Our said Authority granted unto them, treated of, concluded and agreed upon certain Canons, Orders, Ordinances, and Constitutions, to the end and purpose by Us limited and prescribed unto them, and have thereupon offered and presented the same unto Us, most humbly desiring us to give Our Royal Assent unto their said Canons, Orders, Ordinances, and Constitutions, according to the Form of a certain Statute or Act of Parliament made in that behalf, in the twenty-fifth Year of the Reign of King Henry the Eighth, and by Our said Prerogative Royal and Supreme Authority in Causes Ecclesiastical, to ratify by Our Letters Patents under Our Great Seal of England, and to confirm the same; the Title and Tenour of them being word for word as ensueth.

CONSTITUTIONS and CANONS ECCLESIASTICAL, Treated upon by the Bishop of London, President of the Convocation for the Province of Canterbury, and the rest of the Bishops and Clergy of the said Province: and agreed upon with the King's Majesties Licence in their Synod begun at London, Anno Dom. 1603. And in the Year of the Reign of our Sovereign Lord James, by the Grace of God King of England, France, and Ireland, the First, and of Scotland the Thirty-seventh.

OF THE CHURCH OF ENGLAND.

1. The King's Supremacy over the Church of England, in Causes Ecclesiastical, to be maintained.
2. Impugners of the King's Supremacy censured.
3. The Church of England, a true and Apostolical Church.
4. Impugners of the Public Worship of God established in the Church of England, censured.
5. Impugners of the Articles of Religion, established in the Church of England, censured.
6. Impugners of the Rites and Ceremonies, established in the Church of England, censured.
7. Impugners of the Government of the Church of England, by Archbishops, Bishops, &c. censured.
8. Impugners of the Form of Consecrating and Ordering Archbishops, Bishops, &c. in the Church of England, censured.

9. Authors of Schism, in the Church of England, censured.

10. Maintainers of Schismatics, in the Church of England, censured.

11. Maintainers of Conventicles censured.

12. Maintainers of Constitutions made in Conventicles censured.

OF DIVINE SERVICE AND ADMINISTRATION OF THE SACRAMENTS.

13. Due Celebration of Sundays and Holy-days.

14. The Prescript Form of Divine Service to be used on Sundays and Holy-days.

15. The Litany to be read on Wednesdays and Fridays.

16. Colleges to use the prescript Form of Divine Service.

17. Students in Colleges to wear Surplices in time of Divine Service.

18. A Reverence and Attention to be used within the Church in time of Divine Service.

19. Loyerers not to be suffered near the Church in time of Divine Service.
20. Bread and Wine to be provided against every Communion.
21. The Communion to be thrice a Year received.
22. Warning to be given beforehand for the Communion.
23. Students in Colleges to receive the Communion four times a Year.
24. Copes to be worn in Cathedral Churches by those that Administer the Communion.
25. Surplices and Hoods to be worn in Cathedral Churches, when there is no Communion.
26. Notorious offenders not to be admitted to the Communion.
27. Schismatics not to be admitted to the Communion.
28. Strangers not to be admitted to the Communion.
29. Fathers not to be Godfathers in Baptism, nor Children not Communicants.
30. The lawful Use of the Cross in Baptism explained.

MINISTERS, THEIR ORDINATION, FUNCTION AND CHARGE.

31. Four solemn times appointed for the making of Ministers.
32. None to be made Deacon and Minister both in one Day.
33. The Titles of such as are to be made Ministers.
34. The Quality of such as are to be made Ministers.
35. The Examination of such as are to be made Ministers.
36. Subscription required of such as are to be made Ministers.
The Articles of Subscription.
The Form of Subscription.
37. Subscription before the Diocesan.
38. Revolters after Subscription censured.
39. Cautions for Institution of Ministers into Benefices.
40. An Oath against Simony at Institution into Benefices.
41. Licences for Plurality of Benefices limited, and Residence enjoined.
42. Residence of Deans in their Churches.
43. Deans and Prebendaries to Preach during their Residence.
44. Prebendaries to be Resident upon their Benefices.
45. Beneficed Preachers, being Resident upon their Livings, to Preach every Sunday.
46. Beneficed Men, not Preachers, to procure Monthly Sermons.
47. Absence of Beneficed Men to be supplied by Curates that are allowed Preachers.
48. None to be Curates but allowed by the Bishop.
49. Ministers, not allowed Preachers, may not Expound.
50. Strangers not admitted to Preach without showing their Licence.
51. Strangers not admitted to Preach in Cathedral Churches without sufficient Authority.
52. The Names of Strange Preachers to be noted in a Book.
53. No Public Opposition between Preachers.
54. The Licences of Preachers refusing Conformity, to be void.
55. The Form of a Prayer to be used by all Preachers before their Sermons.
56. Preachers and Lecturers to read Divine Service, and administer the Sacraments twice a Year at the least.
57. The Sacraments not to be refused at the hands of Unpreaching Ministers.
58. Ministers reading Divine Service, and administering the Sacraments, to wear Surplices, and Graduates therewithal Hoods.
59. Ministers to Catechize every Sunday.
60. Confirmation to be performed once in three Years.
61. Ministers to prepare Children for Confirmation.
62. Ministers not to Marry any Persons without Banns or Licence.
63. Ministers of Exempt Churches, not to Marry without Banns or Licence.
64. Ministers solemnly to bid Holydays.
65. Ministers solemnly to denounce Recusants and Excommunicates.
66. Ministers to confer with Recusants.
67. Ministers to Visit the Sick.
68. Ministers not to refuse to Christen or Bury.
69. Ministers not to defer Christening, if the Child be in danger.
70. Ministers to keep a Register of Christenings, Weddings and Burials.
71. Ministers not to Preach or Administer the Communion in Private Houses.
72. Ministers not to appoint publick or private Fasts or Prophecies, or to Exorcise, but by Authority.
73. Ministers not to hold private Conventicles.
74. Decency in Apparel enjoined to Ministers.

Canons.

75. Sober Conversation required in Ministers.
 76. Ministers at no time to forsake their Calling.

SCHOOLMASTERS.

77. None to teach School without Licence.
 78. Curates desirous to teach, to be Licensed before others.
 79. The Duty of Schoolmasters.

THINGS APPERTAINING TO CHURCHES.

80. The great Bible, and Book of Common Prayer, to be had in every Church.
 81. A Font of Stone for Baptism in every Church.
 82. A decent Communion Table in every Church.
 83. A Pulpit to be provided in every Church.
 84. A Chest for Alms in every Church.
 85. Churches to be kept in sufficient Reparations.
 86. Churches to be surveyed, and the Decays certified to the High Commissioners.
 87. A Terrier of Glebe Lands, and other Possessions belonging to Churches.
 88. Churches not to be Prophaned.

CHURCHWARDENS, QUESTMEN AND SIDEMEN.

89. The Choice of Churchwardens, and their Account.
 90. The Choice of Sidemen, and their Joynt Office with Churchwardens.

PARISH CLERKS.

91. Parish Clerks to be chosen by the Minister.

ECCLESIASTICAL COURTS BELONGING TO THE ARCHBISHOP'S JURISDICTION.

92. None to be cited into divers Courts for Probate of the same Will.
 93. The Rate of *Bona notabilia* liable to the Prerogative Court.
 94. None to be cited into the Arches or Audience, but dwellers within the Archbishop's Diocese or Peculiars.
 95. The Restraint of double Quarrels.
 96. Inhibitions not to be granted without the Subscription of an Advocate.
 97. Inhibitions not to be granted until the Appeal be exhibited to the Judge.
 98. Inhibitions not to be granted to Factionous Appellants, unless they first Subscribe.
 99. None to Marry within the Degrees Prohibited.

100. None to Marry under Twenty-one Years, without their Parents' Consent.

101. By whom Licences to Marry without Banns shall be granted, and to what sort of Persons.

102. Security to be taken at the granting of such Licences, and under what Conditions.

103. Oaths to be taken for the Conditions.

104. An Exception for those that are in Widowhood.

105. No Sentence of Divorce to be given upon the sole Confession of the Parties.

106. No Sentence for Divorce to be given but in open Court.

107. In all sentences for Divorce, Bond to be taken for not Marrying, during each other's life.

108. The Penalty for Judges offending in the Premises.

ECCLESIASTICAL COURTS BELONGING TO BISHOPS AND INFERIOR ORDINARIES, AND THE PROCEEDINGS IN THEM.

109. Notorious Crimes and Scandals to be certified into Ecclesiastical Courts by Presentment.

110. Schismatics to be presented.

111. Disturbers of Divine Service to be presented.

112. Not Communicants at Easter to be presented.

113. Ministers may present.

114. Ministers shall present Recusants.

115. Ministers and Churchwardens not to be sued for Presenting.

116. Churchwardens not bound to present oftener than twice a Year.

117. Churchwardens not to be troubled for not presenting oftener than twice a Year.

118. The old Churchwardens to make their Presentments before the new be sworn.

119. Convenient time to be assigned for framing Presentments.

120. None to be cited into Ecclesiastical Courts by Process of *Quorum nomina*.

121. None to be cited into several Courts for one Crime.

122. No Sentence of Deprivation or Deposition to be pronounced against a minister, but by the Bishop.

123. No Act to be sped but in open Court.

124. No Court to have more than one seal.

125. Convenient Places to be chosen for the keeping of open Courts.

126. Peculiar and Inferior Courts to exhibit the original Copies of Wills into the Bishop's Registry.

JUDGES OF ECCLESIASTICAL COURTS.

127. The Quality and Oath of Judges.
128. The Quality of Surrogates.

PROCTORS.

129. Proctors not to retain Causes without the lawful Assignment of the Parties.
130. Proctors not to retain Causes without the Counsel of an Advocate.
131. Proctors not to conclude in any Cause without the Knowledge of an Advocate.
132. Proctors prohibited the Oath *In Animam Domini sui*.
133. Proctors not to be clamorous in Court.

REGISTERS.

134. Abuses to be Reformed in Registers.
135. A certain Rate of Fees due to all Ecclesiastical Officers.
136. A Table of the Rates and Fees to be set up in Courts and Registries.
137. The whole Fees for shewing Letters of Orders, and other Licences, due but once in every Bishop's time.

APPARITORS.

138. The Number of Apparitors Restrained.

AUTHORITY OF SYNODS.

139. A National Synod the Church representative.
140. Synods conclude as well the absent as the present.
141. Depravers of the Synod censured.

OF THE CHURCH OF ENGLAND.

1. *The King's Supremacy over the Church of England, in Causes Ecclesiastical, to be Maintained.*

As our duty to the King's most Excellent Majesty requireth, We first decree and ordain, That the Archbishop of Canterbury (from time to time), all Bishops of this Province, all Deans, Archdeacons, Parsons, Vicars, and all other Ecclesiastical Persons, shall faithfully keep and observe, and (as much as in them lieth) shall cause to be observed and kept of others, all and singular Laws and Statutes made for restoring to the Crown of this Kingdom, the ancient Jurisdiction over the State Ecclesiastical, and abolishing of all Foreign Power repugnant to the same. Furthermore, all Ecclesiastical Persons having Cure of souls, and all other Preachers, and Readers of Divinity Lectures, shall, to the uttermost of their Wit, Knowledge and Learning, purely and sincerely (without any colour or dissimulation) teach, manifest, open, and declare four times every year (at the least) in their Sermons and other Collations and Lectures; That all Usurped and Foreign Power (forasmuch as the same hath no establishment nor ground by the Law of God) is for most just causes taken away and abolished: and that therefore no manner of obedience, or subjection within his Majesties Realms and Dominions, is due unto any such Foreign Power: but that the King's Power within His Realms of England, Scotland and Ireland, and all other His Dominions and Countries, is the highest Power under God, to whom all men, as well inhabitants, as born within the same, do by God's Laws owe most Loyalty and Obedience, afore and above all other Powers and Potentates in the earth.

2. *Impugners of the King's Supremacy censured.*

Whosoever shall hereafter affirm, That the King's Majesty hath not the same authority in Causes Ecclesiastical, that the godly Kings had amongst the Jews, and Christian Emperors of the Primitive Church, or impeach any part of His Regal Supremacy in the said causes restored to the Crown, and by the Laws of this Realm therein established: Let him be Excommunicated *ipso facto*, and not restored, but only by the Archbishop, after his repentance and public revocation of those his wicked Errors.

Of the Church
of England.

3. *The Church of England a True and Apostolical Church.*

Whosoever shall hereafter affirm, That the Church of England, by Law established under the King's Majesty, is not a true and Apostolical Church, teaching and maintaining the Doctrine of the Apostles: Let him be Excommunicated *ipso facto*, and not restored, but only by the Archbishop, after his repentance and public revocation of this his wicked Error.

4. *Impugners of the Public Worship of God, established in the Church of England, censured.*

Whosoever shall hereafter affirm, That the Form of God's worship in the Church of England, established by Law, and contained in the Book of Common Prayer and Administration of Sacraments, is a corrupt, superstitious or unlawful worship of God, or containeth any thing in it that is repugnant to the Scriptures: Let him be Excommunicated *ipso facto*, and not restored but by the Bishop of the place, or Archbishop, after his repentance and public revocation of such his wicked Errors.

5. *Impugners of the Articles of Religion, established in the Church of England, censured.*

Whosoever shall hereafter affirm, That any of the Nine and Thirty Articles agreed upon by the Archbishops and Bishops of both Provinces, and the whole Clergy, in the Convocation holden at London in the year of our Lord God one thousand five hundred sixty-two, for avoiding Diversities of Opinions, and for the establishing of Consent touching true Religion, are in any part superstitious or erroneous, or such as he may not with a good conscience subscribe unto: Let him be excommunicated *ipso facto*, and not restored, but only by the Archbishop, after his repentance and public revocation of such his wicked Errors.

6. *Impugners of the Rites and Ceremonies, established in the Church of England, censured.*

Whosoever shall hereafter affirm, That the Rites and Ceremonies of the Church of England by Law established, are wicked, Antichristian or superstitious, or such as being commanded by Lawful Authority, men who are zealously and godly affected, may not with any good conscience approve them, use them, or as occasion requireth, subscribe unto them: Let him be Excommunicated *ipso facto*, and not restored until he repent, and publicly revoke such his wicked Errors.

7. *Impugners of the Government of the Church of England, by Archbishops, Bishops, &c. censured.*

Whosoever shall hereafter affirm, That the Government of the Church of England under his Majesty by Archbishops, Bishops, Deans, Archdeacons, and the rest that bear Office in the same, is Antichristian, or repugnant to the Word of God; Let him be Excommunicated *ipso facto*, and so continue until he repent, and publicly revoke such his wicked Errors.

8. *Impugners of the Form of Consecrating and Ordering Archbishops, Bishops, &c. in the Church of England, censured.*

Whosoever shall hereafter affirm or teach, That the form and manner of making and consecrating Bishops, Priests and Deacons, containeth any thing in it that is repugnant to the Word of God; or that they who are made Bishops, Priests, or Deacons in that form are not lawfully made, nor ought to be accounted either by themselves or others, to be truly either Bishops, Priests or Deacons, until they have some other calling to those Divine Offices: Let him be Excommunicated *ipso facto*, not to be restored until he repent, and publicly revoke such his wicked Errors.

9. *Authors of Schism, in the Church of England, censured.*

Whosoever shall hereafter separate themselves from the Communion of

Saints as it is approved by the Apostles' Rules in the Church of England, and combine themselves together in a new Brotherhood, accounting the Christians who are conformable to the Doctrine, Government, Rites and Ceremonies of the Church of England, to be Profane and unmeet for them to join with in Christian profession; Let them be Excommunicated *ipso facto*, and not restored, but by the Archbishop, after their repentance and public revocation of such their wicked Errors.

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10. *Maintainers of Schismatics, in the Church of England, censured.*

Whosoever shall hereafter affirm, That such ministers as refuse to subscribe to the form and manner of God's Worship in the Church of England, prescribed in the Communion Book, and their Adherents, may truly take unto them the Name of another Church not established by Law, and dare presume to publish it, That this their pretended Church hath of long time groaned under the burden of certain Grievances imposed upon it, and upon the members thereof before-mentioned, by the Church of England, and the Orders and Constitutions therein by law established: Let them be Excommunicated, and not restored until they repent, and publicly revoke such their wicked Errors.

11. *Maintainers of Conventicles censured.*

Whosoever shall hereafter affirm or maintain, That there are within this Realm other Meetings, Assemblies or Congregations, of the King's born subjects, than such as by the Laws of this Land are held and allowed, which may rightly challenge to themselves the Names of True and Lawful Churches: Let him be Excommunicated, and not restored, but by the Archbishop, after his repentance and public revocation of such his wicked Errors.

12. *Maintainers of Constitutions made in Conventicles censured.*

Whosoever shall hereafter affirm, That it is lawful for any sort of Ministers and Lay Persons, or of either of them, to join together, and make Rules, Orders or Constitutions in Causes Ecclesiastical, without the King's Authority, and shall submit themselves to be ruled and governed by them: Let them be Excommunicated *ipso facto*, and not be restored until they repent, and publicly revoke those their wicked and Anabaptistical Errors.

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13. *Due Celebration of Sundays and Holydays.*

All manner of Persons within the Church of England, shall from henceforth celebrate and keep the Lord's day, commonly called Sunday, and other Holydays, according to God's holy will and pleasure, and the Orders of the Church of England, prescribed in that behalf; that is, in hearing the Word of God read and taught; in private and public Prayers; in acknowledging their offences to God, and amendment of the same; in reconciling themselves charitably to their Neighbours where displeasure hath been; in oftentimes receiving the Communion of the Body and Blood of Christ; in visiting of the poor and sick, using all godly and sober conversation.

14. *The Prescript Form of Divine Service to be used on Sundays and Holydays.*

The Common Prayer shall be said or sung distinctly and reverently upon such days as are appointed to be kept Holy by the Book of Common Prayer, and their Eves, and at convenient and usual times of those days, and in such place of every Church as the Bishop of the Diocese, or Ecclesiastical Ordinary of the place shall think meet for the largeness or straitness of the same, so as the people may be most edified. All Ministers likewise shall observe the

Orders, Rites and Ceremonies, prescribed in the Book of Common Prayer, as well in reading the Holy Scriptures and saying of Prayers, as in Administration of the Sacraments, without either diminishing in regard of preaching, or in any other respect, or adding any thing in the matter or form thereof.

15. *The Litany to be read on Wednesdays and Fridays.*

The Litany shall be said or sung when, and as it is set down in the Book of Common Prayer, by the Parsons, Vicars, Ministers, or Curates, in all Cathedral, Collegiate, Parish Churches and Chapels, in some convenient place, according to the discretion of the Bishop of the Diocese, or Ecclesiastical Ordinary of the place. And that we may speak more particularly, upon Wednesdays and Fridays weekly, though they be not Holydays, the Minister at the accustomed hours of Service, shall resort to the Church and Chapel, and warning being given to the people by tolling of a Bell, shall say the Litany prescribed in the Book of Common Prayer: whereunto we wish every Householder dwelling within half a mile of the Church, to come or send one at the least of his household fit to join with the Minister in Prayers.

16. *Colleges to use the prescript Form of Divine Service.*

In the whole Divine Service, and Administration of the Holy Communion, in all Colleges and Halls in both Universities, the Order, Form and Ceremonies shall be duly observed as they are set down and prescribed in the Book of Common Prayer, without any omission or alteration.

17. *Students in Colleges to wear Surplices in time of Divine Service.*

All Masters and Fellows of Colleges or Halls, and all the Scholars and Students in either of the Universities, shall in their Churches and Chapels, upon all Sundays, Holydays, and their Eves, at the time of Divine Service, wear Surplices according to the Order of the Church of England: and such as are Graduates, shall agreeably wear with their Surplices such Hoods as do severally appertain unto their Degrees.

18. *A Reverence and Attention to be used within the Church in time of Divine Service.*

In the time of Divine Service, and of every part thereof, all due Reverence is to be used; for it is according to the Apostle's rule, "Let all things be done decently, and according to order:" Answerable to which Decency and Order, we judge these our Directions following; No man shall cover his Head in the Church or Chapel in the time of Divine Service, except he have some infirmity; in which case, let him wear a Night-cap or Coif. All manner of Persons then present, shall reverently kneel upon their knees when the general Confession, Litany and other Prayers are read; and shall stand up at the saying of the Belief, according to the Rules in that Behalf prescribed in the Book of Common Prayer: And likewise when in time of Divine Service the Lord Jesus shall be mentioned, due and lowly reverence shall be done by all persons present, as it hath been accustomed; testifying by these Outward Ceremonies and Gestures, their inward Humility, Christian Resolution, and due acknowledgement that the Lord Jesus Christ, the true eternal Son of God, is the only Saviour of the World, in whom alone all the Mercies, Graces and Promises of God to Mankind, for this Life and the Life to come, are fully and wholly comprised. None, either man, woman or child, of what calling soever, shall be otherwise at such times busied in the Church, than in quiet attendance to hear, mark and understand that which is Read, Preached or Ministered; saying in their due places audibly with the Minister, the Confession, the Lord's Prayer and the Creed; and making such other Answers to the Public Prayers as are appointed in the Book of Common Prayer: Neither shall they disturb the Service or Sermon by walking or talking, or any other way, nor depart out of the Church during the time of Service or Sermon, without some urgent or reasonable cause.

19. *Loiterers not to be suffered near the Church in time of Divine Service.*

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The Churchwardens or Questmen, and their Assistants, shall not suffer any idle persons to abide either in the Church-yard or Church-porch, during the time of Divine Service or Preaching; but shall cause them either to come in, or to depart.

20. *Bread and Wine to be provided against every Communion.*

The Churchwardens of every Parish, against the time of every Communion, shall at the charge of the Parish, with the advice and direction of the Minister, provide a sufficient quantity of fine white Bread, and of good and wholesome Wine, for the number of Communicants that shall from time to time receive there: which Wine we require to be brought to the Communion Table in a clean and sweet standing Pot or Stoup of Pewter, if not of purer metal.

21. *The Communion to be thrice a year received.*

In every Parish Church and Chapel, where Sacraments are to be administered within this Realm, the Holy Communion shall be ministered by the Parson, Vicar or Minister, so often, and at such times as every Parishioner may Communicate, at the least thrice in the year (whereof the Feast of Easter to be one) according as they are appointed by the Book of Common Prayer. Provided, That every Minister, as oft as he administereth the Communion, shall first receive that Sacrament himself. Furthermore, no Bread or Wine newly brought shall be used: but first the words of Institution shall be rehearsed when the said Bread and Wine be present upon the Communion Table. Likewise the Minister shall deliver both the Bread and the Wine to every Communicant severally.

22. *Warning to be given beforehand for the Communion.*

Whereas every Lay person is bound to receive the Holy Communion thrice every year, and many notwithstanding do not receive that Sacrament once in a year: we do require every Minister to give warning to his Parishioners publicly in the Church at Morning Prayer, the Sunday before every time of his administering that Holy Sacrament, for their better preparation of themselves. Which said warning we enjoin the said Parishioners to accept and obey, under the penalty and danger of the Law.

23. *Students in Colleges to receive the Communion four times a year.*

In all Colleges and Halls within both the Universities, the Masters and Fellows, such especially as have any Pupils, shall be careful that all their said Pupils, and the rest that remain amongst them, be well brought up, and thoroughly instructed in points of Religion, and that they do diligently frequent public Service and Sermons, and receive the Holy Communion: which we ordain to be administered in all such Colleges and Halls the first or second Sunday of every Month, requiring all the said Masters, Fellows and Scholars, and all the rest of the Students, Officers, and all other the servants, there so to be ordered, that every one of them shall communicate four times in the year at the least, kneeling reverently and decently upon their knees, according to the order of the Communion-Book prescribed in that behalf.

24. *Copes to be worn in Cathedral Churches by those that Administer the Communion.*

In all Cathedral and Collegiate Churches, the Holy Communion shall be administered upon principal Feast-days, sometimes by the Bishop, if he be present, and sometimes by the Dean, and at sometimes by a Canon or Prebendary, the principal Minister using a decent Cope, and being assisted with the Gospeller and Epistler agreeably, according to the Advertisements published Ann. 7 Elizabethæ: The said Communion to be Administered at such times, and with such limitation as is specified in the Book of Common

Prayer. Provided, That no such limitation by any construction shall be allowed of, but that all Deans, Wardens, Masters, or Heads of Cathedral and Collegiate Churches, Prebendaries, Canons, Vicars, Petty Canons, Singing-men, and all others of the Foundation, shall receive the Communion four times yearly at the least.

25. *Surplices and Hoods to be worn in Cathedral Churches when there is no Communion.*

In the time of Divine Service and Prayers in all Cathedral and Collegiate Churches, when there is no communion, it shall be sufficient to wear Surplices: Saving that all Deans, Masters and Heads of Collegiate Churches, Canons and Prebendaries, being Graduates, shall daily at the times both of Prayer and Preaching, wear with their Surplices such Hoods as are agreeable to their Degrees.

26. *Notorious Offenders not to be admitted to the Communion.*

No Minister shall in any wise admit to the receiving of the Holy Communion, any of his Cure or Flock which be openly known to live in sin notorious without repentance, nor any who have maliciously and openly contended with their neighbours, until they shall be reconciled: Nor any Churchwardens or Sidemen, who having taken their Oaths to present to their Ordinaries all such public Offences as they are particularly charged to inquire of in their several Parishes, shall (notwithstanding their said Oaths, and that their faithful discharging of them is the chief means whereby public sins and offences may be reformed and punished) wittingly and willingly, desperately and irreligiously incur the horrible crime of Perjury, either in neglecting or in refusing to present such of the said enormities and public offences as they know themselves to be committed in their said Parishes or are notoriously offensive to the Congregation there, although they be urged by some of their Neighbours, or by their Minister, or by their Ordinary himself, to discharge their Consciences by presenting of them, and not to incur so desperately the said horrible sin of Perjury.

27. *Schismatics not to be admitted to the Communion.*

No Minister when he celebrateth the Communion shall wittingly administer the same to any but to such as kneel, under pain of suspension, nor under the like pain to any that refuse to be present at public Prayers, according to the Orders of the Church of England, nor to any that are common and notorious depravers of the Book of Common Prayer, and Administration of the Sacraments, and of the Orders, Rites and Ceremonies therein prescribed, or of any thing that is contained in any of the Articles agreed upon in the Convocation, One thousand five hundred sixty and two, or of any thing contained in the Book of Ordering Priests and Bishops, or to any that have spoken against and depraved His Majesty's Sovereign Authority in Causes Ecclesiastical; except every such Person shall first acknowledge to the Minister before the Churchwardens, his repentance for the same, and promise by word (if he cannot write) that he will do so no more; and except (if he can write) he shall first do the same under his Hand-writing, to be delivered to the Minister, and by him sent to the Bishop of the Diocese, or Ordinary of the place. Provided, that every Minister so repelling any (as is specified either in this or in the next precedent Constitution) shall upon complaint or being required by the Ordinary, signify the cause thereof unto him, and therein obey his Order and Direction.

28. *Strangers not to be admitted to the Communion.*

The Churchwardens or Questmen, and their Assistants, shall mark as well as the Minister, whether all and every of the Parishioners come so often every year to the Holy Communion, as the Laws and our Constitutions do require: And whether any Strangers come often commonly from other Parishes to their Church, and shall show their Minister of them, lest perhaps they be ad-

mitted to the Lord's Table amongst others, which they shall forbid, and remit such home to their own Parish Churches and Ministers, there to receive the Communion with the rest of their own Neighbours.

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29. *Fathers not to be Godfathers in Baptism, nor Children not Communicants.*

No Parent shall be urged to be present, nor be admitted to answer as Godfather for his own Child: Nor any Godfather or Godmother shall be suffered to make any other Answer or Speech, than by the Book of Common Prayer is prescribed in that behalf: neither shall any person be admitted Godfather or Godmother to any Child at Christening or Confirmation, before the said person so undertaking hath received the Holy Communion.

30. *The lawful use of the Cross in Baptism explained.*

We are sorry that His Majesties most Princely care and pains taken in the Conference at Hampton Court, amongst many other points, touching this one of the Cross in Baptism, hath taken no better effect with many, but that still the Use of it in Baptism is so greatly stuck at and impugned. For the further declaration therefore of the true use of this Ceremony, and for the removing of all such scruple as might any ways trouble the Consciences of them who are indeed rightly Religious, following the Royal Steps of our most worthy King, because he therein followeth the Rules of the Scriptures, and the Practice of the Primitive Church; we do commend to all the true Members of the Church of England, these our Directions and Observations ensuing.

First. It is to be Observed, That although the Jews and Ethnics derided both the Apostles, and the rest of the Christians, for preaching and believing in him who was crucified upon the Cross; yet all, both Apostles and Christians, were so far from being discouraged from their profession by the ignominy of the Cross, as they rather rejoiced and triumphed in it. Yea, the Holy Ghost by the mouths of the Apostles, did honour the name of the Cross, (being hateful among the Jews), so far, that under it he comprehended not only Christ crucified, but the force, effects, and merits of his Death and Passion, with all the comforts, fruits and promises, which we receive or expect thereby.

Secondly. The honour and dignity of the Name of the Cross, begat a reverend estimation even in the Apostles' times (for aught that is known to the contrary) of the sign of the Cross, which the Christians shortly after used in all their actions, thereby making an outward show and profession even to the astonishment of the Jews, That they were not ashamed to acknowledge him for their Lord and Saviour, who died for them upon the Cross. And this Sign they did not only use themselves with a kind of glory, when they met with any Jews, but Signed therewith their Children when they were Christened, to dedicate them by that badge to his Service, whose benefits bestowed upon them in Baptism, the Name of the Cross did represent. And this use of the Sign of the Cross in Baptism was held in the Primitive Church, as well by the Greeks as the Latins, with one consent and great applause. At what time, if any had opposed themselves against it, they would certainly have been censured as Enemies of the Name of the Cross, and consequently of Christ's Merits, the Sign whereof they could no better endure. This continual and general use of the Sign of the Cross, is evident by many testimonies of the ancient Fathers.

Thirdly. It must be confessed, that in process of time the Sign of the Cross was greatly abused in the Church of Rome, especially after that corruption of Popery had once possessed it. But the abuse of a thing doth not take away the lawful use of it. Nay, so far was it from the purpose of the Church of England to forsake and reject the Churches of Italy, France, Spain, Germany, or any such like Churches, in all things which they held and practised, that, as the Apology of the Church of England confesseth, it doth with reverence retain those Ceremonies, which do neither endamage the Church of God, nor offend the minds of sober men: and only departed from

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them in those particular points, wherein they were fallen both from themselves in their ancient integrity, and from the Apostolical Churches which were their first Founders. In which respect, amongst some other very ancient Ceremonies, the Sign of the Cross in Baptism hath been retained in this Church, both by the judgment and practice of those reverend Fathers and great Divines in the days of King Edward the Sixth, of whom some constantly suffered for the profession of the truth; and others being exiled in the time of Queen Mary, did after their return in the beginning of the Reign of our late dread Sovereign, continually defend and use the same. This resolution and practice of our Church hath been allowed and approved by the censure upon the Communion Book in King Edward the Sixth his days, and by the Harmony of Confessions of latter years; because indeed the use of this Sign in Baptism, was ever accompanied here with such sufficient cautions and exceptions against all Popish Superstition and Error, as in the like cases are either fit or convenient.

First, the Church of England since the abolishing of Popery hath ever held and taught, and so doth hold and teach still, that the Sign of the Cross used in Baptism, is no part of the substance of that Sacrament: For when the Minister dipping the Infant in Water, or laying Water upon the face of it (as the manner also is) hath pronounced these words, "I baptize thee in the Name of the Father, and of the Son, and of the Holy Ghost," the Infant is fully and perfectly Baptized. So as the Sign of the Cross being afterwards used, doth neither add any thing to the virtue and perfection of Baptism, nor being omitted doth detract any thing from the effect and substance of it.

Secondly. It is apparent in the Communion-Book, that the Infant Baptized is, by virtue of Baptism, before it be Signed with the Sign of the Cross, received into the Congregation of Christ's Flock as a perfect Member thereof, and not by any power ascribed unto the Sign of the Cross, so that for the very remembrance of the Cross, which is very precious to all them that rightly believe in Jesu Christ, and in the other respects mentioned, the Church of England hath retained still the Sign of it in Baptism: following therein the Primitive and Apostolical Churches, and accounting it a lawful outward Ceremony and honourable Badge, whereby the Infant is dedicated to the service of him that died upon the Cross, as by the words used in the Book of Common Prayer it may appear.

Lastly, The use of the Sign of the Cross in Baptism, being thus purged from all Popish Superstition and Error, and reduced in the Church of England to the primary Institution of it, upon those true Rules of Doctrine concerning things indifferent, which are consonant to the Word of God, and the judgments of all the ancient Fathers, we hold it the part of every private man, both Minister and other, reverently to retain the true use of it prescribed by public Authority, considering that things of themselves indifferent, do in some sort alter their natures, when they are either commanded or forbidden by a lawful Magistrate, and may not be omitted at every man's pleasure contrary to the Law, when they be commanded, nor used when they are prohibited.

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dination,
Function,
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MINISTERS, THEIR ORDINATION, FUNCTION AND CHARGE.

31. *Four solemn times appointed for the making of Ministers.*

Forasmuch as the ancient Fathers of the Church, led by example of the Apostles, appointed Prayers and Fasts to be used at the solemn Ordering of Ministers; and to that purpose allotted certain times, in which only Sacred Orders might be given or conferred: We following their holy and religious example, do constitute and decree, That no Deacons or Ministers be made and ordained, but only upon the Sundays immediately following *Jejunia quatuor temporum*, commonly called Ember week, appointed in ancient time for Prayer and Fasting (purposely for this cause at their first Institution) and

so continued at this day in the Church of England : and that this be done in the Cathedral or Parish Church where the Bishop resideth, and in the time of Divine Service, in the presence not only of the Archdeacon, but of the Dean and two Prebendaries at the least, or (if they shall happen by any lawful cause to be let or hindered) in the presence of four other grave Persons, being Masters of Arts at the least, and allowed for Public Preachers.

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32. *None to be made Deacon and Minister both in one day.*

The Office of Deacon being a step or degree to the Ministry, according to the judgment of the ancient Fathers, and the practice of the Primitive Church; We do ordain and appoint, That hereafter no Bishop shall make any person, of what qualities or gifts soever, a Deacon and a Minister both together upon one day; but that the order in that behalf prescribed in the Book of making and consecrating Bishops, Priests and Deacons, be strictly observed. Not that always every Deacon should be kept from the Ministry for a whole year, when the Bishop shall find good cause to the contrary; but that there being now four times appointed in every year for the Ordination of Deacons and Ministers, there may ever be some time of trial of their behaviour in the Office of Deacon, before they be admitted to the Order of Priesthood.

33. *The Titles of such as are to be made Ministers.*

It hath been long since provided by many Decrees of the ancient Fathers, that none should be admitted either Deacon or Priest, who had not first some certain place where he might use his Function. According to which examples we do ordain, that henceforth no person shall be admitted into Sacred Orders, except he shall at that time exhibit to the Bishop, of whom he desireth Imposition of hands, a Presentation of himself to some Ecclesiastical Preferment then void in that Diocese : or shall bring to the said Bishop a true and undoubted Certificate, that either he is provided of some Church within the said Diocese, where he may attend the Cure of Souls, or of some Minister's place vacant, either in the Cathedral Church of that Diocese, or in some other Collegiate Church therein also situate, where he may execute his ministry : or that he is a Fellow, or in right as a Fellow, or to be a Conduct or Chaplain in some College in Cambridge or Oxford : or except he be a Master of Arts of five years' standing, that liveth of his own charge in either of the Universities : or except by the Bishop himself, that doth Ordain him Minister, he be shortly after to be admitted either to some Benefice or Curateship then void. And if any Bishop shall admit any person into the Ministry that hath none of these Titles, as is aforesaid, then he shall keep and maintain him with all things necessary, till he do prefer him to some Ecclesiastical Living. And if the said Bishop shall refuse so to do, he shall be suspended by the Archbishop, being assisted with another Bishop, from giving of Orders by the space of a year.

34. *The Quality of such as are to be made Ministers.*

No Bishop shall henceforth admit any person into Sacred Orders which is not of his own Diocese, except he be either of one of the Universities of this Realm, or except he shall bring Letters Dimissory (so termed) from the Bishop of whose Diocese he is, and desiring to be a Deacon, is three and twenty years old, and to be a Priest, four and twenty years complete, and hath taken some Degree of School in either of the said Universities, or at the least, except he be able to yield an account of his Faith in Latin, according to the Articles of Religion approved in the Synod of the Bishops and Clergy of this Realm, One thousand five hundred sixty and two, and to confirm the same by sufficient Testimonies out of the Holy Scriptures : and except moreover, he shall then exhibit Letters Testimonial of his good Life and Conversation, under the Seal of some College of Cambridge or Oxford, where before he remained, or of three or four grave ministers, together with the Subscription and Testimony of other credible persons, who have known his life and behaviour by the space of three years next before.

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35. *The Examination of such as are to be made Ministers.*

The Bishop before he admit any person to Holy Orders, shall diligently examine him in the presence of those Ministers that shall assist him at the Imposition of hands: And if the said Bishop have any lawful Impediment, he shall cause the said Ministers carefully to examine every such Person so to be Ordered. Provided that they who shall assist the Bishop in examining and Laying on of hands, shall be of his Cathedral Church, if they may conveniently be had, or other sufficient Preachers of the same Diocese, to the number of three at the least: And if any Bishop or Suffragan shall admit any to Sacred Orders, who is not so qualified and examined, as before we have ordained, the Archbishop of his Province, having notice thereof, and being assisted therein by one Bishop, shall suspend the said Bishop or Suffragan so offending, from making either Deacons or Priests for the space of two years.

36. *Subscription required of such as are to be made Ministers.*

No person shall hereafter be received into the Ministry, nor either by Institution or Collation, admitted to any Ecclesiastical Living, nor suffered to Preach, to Catechise, or to be a Lecturer or Reader of Divinity in either University, or in any Cathedral or Collegiate Church, City or Market Town, Parish Church, Chapel, or in any other place within this Realm, except he be Licensed either by the Archbishop, or by the Bishop of the Diocese, (where he is to be placed) under their Hands and Seals, or by one of the two Universities, under their Seal likewise; and except he shall first subscribe to these three Articles following, in such manner and sort as we have here appointed.

1. That the King's Majesty under God, is the only Supreme Governour of this Realm, and of all other His Highness's Dominions and Countries, as well in all Spiritual or Ecclesiastical things or causes, as Temporal, and that no Foreign Prince, Person, Prelate, State or Potentate, hath or ought to have any Jurisdiction, Power, Superiority, Preeminence or Authority, Ecclesiastical or Spiritual, within His Majesties said Realms, Dominions and Countries.

2. That the Book of Common Prayer, and of ordering of Bishops, Priests, and Deacons, containeth in it nothing contrary to the Word of God, and that it may lawfully so be used, and that he himself will use the Form in the said Book prescribed in Public Prayer, and Administration of the Sacraments, and none other.

3. That he alloweth the Book of Articles of Religion agreed upon by the Archbishops and Bishops of both Provinces, and the whole Clergy in the Convocation holden at London in the year of our Lord God, One thousand five hundred sixty and two; and that he acknowledgeth all and every the Articles therein contained, being in number Nine and thirty, besides the Ratification, to be agreeable to the Word of God.

To these three Articles whosoever will subscribe, he shall for the avoiding of all ambiguities, subscribe in this order and form of words, setting down both his christian and surname, viz. "*I N. N. do willingly and ex animo, subscribe to these three Articles above mentioned, and to all things that are contained in them.*" And if any Bishop shall Ordain, Admit or License any, as is aforesaid, Except he first have subscribed in manner and form as here we have appointed, he shall be suspended from giving of Orders and Licences to Preach for the space of twelve Months. But if any of the Universities shall offend therein, we leave them to the danger of the Law, and his Majesties Censure.

37. *Subscription before the Diocesan.*

None Licensed, as is aforesaid, to Preach, Read, Lecture, or Catechize, coming to reside in any Diocese, shall be permitted there to Preach, Read, Lecture, Catechize or Minister the Sacraments, or to execute any other Ecclesiastical Function (by what authority soever he be thereunto admitted, unless he first consent and subscribe to the three Articles before mentioned)

in the presence of the Bishop of the Diocese wherein he is to Preach, Read, Lecture, Catechize, or Administer the Sacraments, as aforesaid.

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38. *Revolters after Subscription censured.*

If any Minister, after he hath once subscribed to the said three Articles, shall omit to use the Form of Prayer, or any of the Orders or Ceremonies prescribed in the Communion Book, let him be suspended: and if after a Month he do not reform and submit himself, let him be Excommunicated: and then if he shall not submit himself within the space of another Month, let him be deposed from the Ministry.

39. *Cautions for Institution of Ministers into Benefices.*

No Bishop shall institute any to a Benefice who hath been Ordained by any other Bishop, except he first show unto him his Letters of Orders, and bring him a sufficient Testimony of his former good life and behaviour, if the Bishop shall require it: and lastly, shall appear upon due examination to be worthy of his Ministry.

40. *An Oath against Simony at Institution into Benefices.*

To avoid the detestable sin of Simony, because buying and selling of Spiritual and Ecclesiastical Functions, Offices, Promotions, Dignities, and Livings, is execrable before God; therefore the Archbishop, and all and every Bishop or Bishops, or any other person or persons, having Authority to Admit, Institute, Collate, Instal, or to confirm the Election of any Archbishop, Bishop, or other person or persons to any Spiritual or Ecclesiastical Function, Dignity, Promotion, Title, Office, Jurisdiction, Place, or Benefice with Cure, or without Cure, or to any Ecclesiastical Living whatsoever, shall before every such Admission, Institution, Collation, Installation, or Confirmation of Election, respectively minister to every person hereafter to be Admitted, Instituted, Collated, Installed, or Confirmed in or to any Archbishopric, Bishopric, or other Spiritual or Ecclesiastical Function, Dignity, Promotion, Title, Office, Jurisdiction, Place, or Benefice with Cure, or without Cure, or in or to any Ecclesiastical Living whatsoever, this Oath in manner and form following, the same to be taken by every one whom it concerneth in his own person, and not by a Proctor: "I N. N. do swear, That I have made no Simoniacal payment, contract or promise, directly or indirectly, by myself or by any other to my knowledge, or with my consent, to any person or persons whatsoever, for or concerning the procuring and obtaining of this Ecclesiastical Dignity, Place, Preferment, Office or Living, (respectively and particularly naming the same whereunto he is to be Admitted, Instituted, Collated, Installed or Confirmed,) nor will at any time hereafter perform or satisfy any such kind of payment, contract or promise made by any other without my knowledge or consent: So help me God, through Jesus Christ."

41. *Licences for Plurality of Benefices limited, and Residence enjoined.*

No Licence or Dispensation for the keeping of more Benefices with Cure than one, shall be granted to any, but such only as shall be thought very well worthy for his Learning, and very well able and sufficient to discharge his duty, that is, who shall have taken the Degree of a Master of Arts, at the least in one of the Universities of this Realm, and be a public and sufficient Preacher Licensed. Provided always, That he be by a good and sufficient caution bound to make his personal Residence in each his said Benefices for some reasonable time in every year: And that the said Benefices be not more than thirty miles distant asunder: and lastly, that he have under him in the Benefice where he doth not reside, a Preacher lawfully allowed, that is able sufficiently to teach and instruct the people.

42. *Residence of Deans in their Churches.*

Every Dean, Master or Warden, or chief Governour of any Cathedral or

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Collegiate Church, shall be resident in the said Cathedral or Collegiate Church fourscore and ten days, Coniunctim or Divisim in every year at the least, and then shall continue there in Preaching the Word of God, and keeping good Hospitality, except he shall be otherwise let with weighty and urgent causes to be approved by the Bishop of the Diocese, or in any other lawful sort dispensed with. And when he is present, he, with the rest of the Canons or Prebendaries resident, shall take special care that the Statutes and laudable Customs of their Church (not being contrary to the Word of God, or Prerogative Royal) the Statutes of this Realm being in force concerning Ecclesiastical Order, and all other Constitutions now set forth and Confirmed by his Majesties Authority, and such as shall be lawfully enjoined by the Bishop of the Diocese, in his Visitation, according to the Statutes and Customs of the same Church, or the Ecclesiastical Laws of this Realm, be diligently observed, and that the Petty Canons, Vicars Choral, and other Ministers of their Church, be urged to the study of the Holy Scriptures; and every one of them to have the New Testament not only in English, but also in Latin.

43. *Deans and Prebendaries to Preach during their Residence.*

The Dean, Master, Warden or chief Governour, Prebendaries and Canons, in every Cathedral and Collegiate Church, shall not only Preach there in their own persons, so often as they are bound by Law, Statute, Ordinance, or Custom, but shall likewise Preach in other Churches of the same Diocese where they are Resident, and especially in those places whence they or their Church receive any yearly Rents or Profits. And in case they themselves be sick, or lawfully absent, they shall substitute such licensed Preachers to supply their turns, as by the Bishop of the Diocese shall be thought meet to Preach in Cathedral Churches. And if any otherwise neglect or omit to supply his course, as is aforesaid, the Offendor shall be punished by the Bishop, or by him or them to whom the Jurisdiction of that Church appertaineth, according to the quality of the Offence.

44. *Prebendaries to be Resident upon their Benefices.*

No Prebendaries nor Canons in Cathedral or Collegiate Churches, having one or more Benefices with Cure (and not being Residentiaries in the same Cathedral or Collegiate Churches) shall under colour of their said Prebends, absent themselves from their Benefices with Cure above the space of one Month in the year, unless it be for some urgent cause, and certain time to be allowed by the Bishop of the Diocese. And such of the said Canons and Prebendaries as by the Ordinances of the Cathedral or Collegiate Churches do stand bound to be Resident in the same, shall so among themselves sort and proportion the times of the year, concerning Residence to be kept in the said Churches, as that some of them always shall be personally Resident there: and that all those who be, or shall be Residentiaries in any Cathedral or Collegiate Church, shall after the days of their Residency, appointed by their local Statutes or Customs expired, presently repair to their Benefices, or some one of them, or to some other charge where the Law requireth their presence, there to discharge their Duties according to the Laws in that case provided. And the Bishop of the Diocese shall see the same to be duly performed and put in execution.

45. *Beneficed Preachers being Resident upon their Livings, to Preach every Sunday.*

Every Beneficed Man allowed to be a Preacher, and Residing on his Benefice, having no lawful Impediment, shall in his own Cure, or in some other Church or Chapel where he may conveniently, near adjoining, (where no Preacher is,) Preach one Sermon every Sunday of the year, wherein he shall soberly and sincerely divide the Word of truth, to the glory of God, and to the best edification of the People.

46. *Beneficed Men, not Preachers, to procure Monthly Sermons.*

Every Beneficed Man, not allowed to be a Preacher, shall procure Sermons to be Preached in his Cure once in every Month at the least, by Preachers lawfully Licensed, if his Living, in the judgment of the Ordinary, will be able to bear it. And upon every Sunday, when there shall not be a Sermon preached in his Cure, he or his Curate shall read some one of the Homilies prescribed, or to be prescribed by Authority, to the intents aforesaid.

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47. *Absence of Beneficed Men to be supplied by Curates that are allowed Preachers.*

Every Beneficed Man Licensed by the Laws of this Realm, upon urgent occasions of other service, not to reside upon his Benefice, shall cause his Cure to be supplied by a Curate that is a sufficient and Licensed Preacher, if the worth of the Benefice will bear it. But whosoever hath two Benefices, shall maintain a Preacher Licensed, in the Benefice where he doth not reside, except he Preach himself at both of them usually.

48. *None to be Curates but allowed by the Bishop.*

No Curate or Minister shall be permitted to serve in any place, without Examination and Admission of the Bishop of the Diocese or Ordinary of the place having Episcopal Jurisdiction, in Writing under his Hand and Seal, having respect to the greatness of the Cure, and meetness of the party. And the said Curates and Ministers, if they remove from one Diocese to another, shall not be by any means admitted to serve without Testimony of the Bishop of the Diocese, or Ordinary of the place as aforesaid, whence they came, in writing, of their honesty, ability, and conformity to the Ecclesiastical Laws of the Church of England. Nor any shall serve more than one Church or Chapel upon one day, except that Chapel be a member of the Parish Church, or united thereunto: and unless the said Church or Chapel, where such a Minister shall serve in two places, be not able in the judgment of the Bishop or Ordinary, as aforesaid, to maintain a Curate.

49. *Ministers, not allowed Preachers, may not Expound.*

No person whatsoever not examined and approved by the Bishop of the Diocese, or not Licensed, as is aforesaid, for a sufficient or convenient Preacher, shall take upon him to Expound in his own Cure or elsewhere, any Scripture or Matter of Doctrine, but shall only study to read plainly and aptly (without glossing or adding) the Homilies already set forth, or hereafter to be published by lawful Authority, for the confirmation of the true Faith, and for the good instruction and edification of the people.

50. *Strangers not admitted to Preach, without showing their Licence.*

Neither the Minister, Churchwardens, nor any other Officers of the Church, shall suffer any Man to preach within their Churches or Chapels, but such as by showing their Licence to Preach, shall appear unto them to be sufficiently authorized thereunto, as is aforesaid.

51. *Strangers not admitted to Preach in Cathedral Churches without sufficient Authority.*

The Deans, Presidents, and Residentiaries of any Cathedral or Collegiate Church, shall suffer no Stranger to preach unto the people in their Churches, except they be allowed by the Archbishop of the Province, or by the Bishop of the same Diocese, or by either of the Universities. And if any in his Sermon shall publish any Doctrine, either strange or disagreeing from the Word of God, or from any of the Articles of Religion agreed upon in the Convocation House, Anno 1562, or from the Book of Common Prayers, the Dean or the Residents shall by their Letters subscribed with some of their Hands that heard him, so soon as may be, give notice of the same to the Bishop of the Diocese, that he may determine the Matter, and take such Order therein as he shall think convenient.

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52. *The Names of Strange Preachers to be noted in a Book.*

That the Bishop may understand (if occasion so require) what Sermons are made in every Church of his Diocese, and who presume to Preach without Licence, the Churchwardens and Sidemen shall see that the Names of all Preachers which come to their Church from any other place, be noted in a Book, which they shall have ready, for that purpose: wherein every Preacher shall subscribe his name, the day when he Preached, and the Name of the Bishop of whom he had Licence to Preach.

53. *No Public Opposition between Preachers.*

If any Preacher shall in the Pulpit particularly, or namely of purpose, impugn or confute any Doctrine delivered by any other Preacher in the same Church, or in any Church near adjoining, before he hath acquainted the Bishop of the Diocese therewith, and received order from him what to do in that case, because upon such public dissenting and contradicting, there may grow much offence and disquietness unto the people: the Churchwardens or Party grieved, shall forthwith signify the same to the said Bishop, and not suffer the said Preacher any more to occupy that place which he hath once abused, except he faithfully promise to forbear all such matter of Contention in the Church, until the Bishop hath taken further Order therein: who shall with all convenient speed so proceed therein, that public Satisfaction may be made in the Congregation where the offence was given. Provided, That if either of the Parties offending do appeal, he shall not be suffered to preach *pendente lite*.

54. *The Licences of Preachers refusing Conformity, to be void.*

If any man Licensed heretofore to Preach, by any Archbishop, Bishop, or by either of the Universities, shall at any time from henceforth refuse to conform himself to the Laws, Ordinances, and Rites Ecclesiastical established in the Church of England, he shall be admonished by the Bishop of the Diocese or Ordinary of the Place, to submit himself to the use and due exercise of the same. And if after such admonition, he do not conform himself within the space of one Month, We determine and decree, That the Licence of every such Preacher shall thereupon be utterly void and of none effect.

55. *The Form of a Prayer to be used by all Preachers before their Sermons.*

Before all Sermons, Lectures and Homilies, the Preachers and Ministers shall move the people to join with them in Prayer, in this form, or to this effect, as briefly as conveniently they may. Ye shall pray for Christ's Holy Catholic Church, that is, for the whole Congregation of Christian People dispersed throughout the whole World, and especially for the Churches of England, Scotland and Ireland. And herein I require you most especially to pray for the King's most Excellent Majesty, Our Sovereign Lord James, King of England, Scotland, France, and Ireland, Defender of the Faith, and Supreme Governour in these His Realms, and all other His Dominions and Countries, over all Persons, in all Causes, as well Ecclesiastical as Temporal. Ye shall also pray for our gracious Queen Anne, the Noble Prince Henry, and the rest of the King and Queen's Royal Issue. Ye shall also pray for the Ministers of God's holy Word and Sacraments, as well Archbishops and Bishops, as other Pastors and Curates. Ye shall also pray for the King's most honourable Council, and for all the Nobility and Magistrates of this Realm, that all and every of these in their several Callings, may serve truly and painfully to the glory of God, and the edifying and well governing of his people, remembering the Account that they must make. Also ye shall pray for the whole Commons of this Realm, that they may live in the true faith and fear of God, in humble obedience to the King and brotherly charity one to another. Finally, let us praise God for all those which are departed out of this life in the faith of Christ, and pray unto God that we may have grace

to direct our lives after their good Example: that this life ended, we may be made partakers with them of the glorious Resurrection in the life everlasting; always concluding with the Lord's Prayer.

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56. *Preachers and Lecturers to read Divine Service, and administer the Sacraments twice a year at the least.*

Every Minister being possessed of a Benefice that hath Cure and Charge of Souls, although he chiefly attend to Preaching, and hath a Curate under him to execute the other Duties which are to be performed for him in the Church, and likewise every other Stipendiary Preacher that readeth any Lecture, or Catechizeth, or Preacheth in any Church or Chapel, shall twice at the least every year read himself the Divine Service, upon two several Sundays publicly, and at the usual times, both in the Forenoon and Afternoon, in the Church which he so possesseth, or where he Readeth, Catechizeth or Preacheth, as is aforesaid, and shall likewise as often in every year Administer the Sacraments of Baptism (if there be any to be baptized) and of the Lord's Supper, in such manner and form, and with the observation of all such Rites and Ceremonies as are prescribed by the Book of Common Prayer in that behalf: which if he do not accordingly perform, then shall he that is possessed of a Benefice (as before) be suspended: and he that is but a Reader, Preacher, or Catechizer, be removed from his place by the Bishop of the Diocese, until he or they shall submit themselves to perform all the said Duties, in such manner and sort as before is prescribed.

57. *The Sacraments not to be refused at the hands of Unpreaching Ministers.*

Whereas divers persons seduced by false Teachers, do refuse to have their children Baptized by a Minister that is no Preacher, and to receive the Holy Communion at his hands in the same respect, as though the virtue of those Sacraments did depend upon his ability to Preach: Forasmuch as the Doctrine both of Baptism and of the Lord's Supper is so sufficiently set down in the Book of Common Prayer to be used at the Administration of the said Sacraments, as nothing can be added unto it that is material and necessary: We do require and charge every such person seduced as aforesaid, to reform that their wilfulness, and to submit himself to the Order of the Church in that behalf, both the said Sacraments being equally effectual, whether they be ministered by a Minister that is no Preacher, or by one that is a Preacher. And if any hereafter shall offend herein, or leave their own Parish Churches in that respect, and communicate, or cause their Children to be Baptized in other Parishes abroad, and will not be moved thereby to reform that their Error and unlawful course: Let them be presented to the Ordinary of the place by the Minister, Churchwardens, and Sidemen or Questmen of the Parishes where they dwell, and there receive such punishment by Ecclesiastical Censures, as such Obstinacy doth worthily deserve: that is, Let them (persisting in their wilfulness) be Suspended, and then after a Month's further Obstinacy Excommunicated. And likewise, if any Parson, Vicar or Curate, shall after the publishing hereof, either receive to the Communion any such persons which are not of his own Church and Parish, or shall Baptize any of their Children, thereby strengthening them in their said Errors: Let him be suspended, and not released thereof, until he do faithfully promise that he will not afterwards offend therein.

58. *Ministers reading Divine Service, and Administering the Sacraments, to wear Surplices, and Graduates therewithal Hoods.*

Every Minister saying the Public Prayers, or ministering the Sacraments, or other Rites of the Church, shall wear a comely Surplice with sleeves, to be provided at the charge of the Parish. And if any Question arise touching the Matter, Decency or Comeliness thereof, the same shall be decided by the discretion of the Ordinary. Furthermore, such Ministers, as are Graduates, shall wear upon their Surplices at such times, such Hoods as by the Orders of the Universities are agreeable to their Degrees, which no Minister shall

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wear (being no Graduate) under pain of suspension. Notwithstanding it shall be lawful for such Ministers as are not Graduates, to wear upon their Surplices, instead of Hoods, some decent Tippet of Black, so it be not Silk.

59. *Ministers to Catechize every Sunday.*

Every Parson, Vicar or Curate, upon every Sunday and Holiday before Evening Prayer, shall for half an hour or more, examine and instruct the Youth and ignorant Persons of his Parish in the Ten Commandments, the Articles of the Belief, and in the Lord's Prayer: and shall diligently hear, instruct, and teach them the Catechism set forth in the Book of Common Prayer. And all Fathers, Mothers, Masters and Mistresses, shall cause their Children, Servants, and Apprentices, which have not learned the Catechism, to come to the Church at the time appointed, obediently to hear, and to be ordered by the Minister until they have learned the same. And if any Minister neglect his duty herein, let him be sharply reproved upon the first Complaint, and true Notice thereof given to the Bishop or Ordinary of the place. If after submitting himself, he shall willingly offend therein again, let him be suspended. If so the third time, there being little hope that he will be therein reformed, then Excommunicated, and so remain until he will be reformed. And likewise, if any of the said Fathers, Mothers, Masters or Mistresses, Children, Servants, or Apprentices shall neglect their Duties, as the one sort in not causing them to come, and the other in refusing to learn as aforesaid: Let them be Suspended by their Ordinaries (if they be not Children), and if they so persist by the space of a Month, then let them be Excommunicated.

60. *Confirmation to be performed once in three Years.*

Forasmuch as it hath been a solemn, ancient and laudable Custom in the Church of God, continued from the Apostles' times, that all Bishops should lay their Hands upon Children baptized and instructed in the Catechism of Christian Religion, praying over them, and blessing them, which we commonly call Confirmation, and that this holy Action hath been accustomed in the Church in former Ages, to be performed in the Bishop's Visitation every third year: We will and appoint, that every Bishop or his Suffragan, in his accustomed Visitation, do in his own person carefully observe the said Custom. And if in that year, by reason of some Infirmary, he be not able personally to Visit, then he shall not omit the execution of that Duty of Confirmation the next year after, as he may conveniently.

61. *Ministers to prepare Children for Confirmation.*

Every Minister that hath Cure and Charge of Souls, for the better accomplishing of the Orders prescribed in the Book of Common Prayer concerning Confirmation, shall take especial Care as that none shall be presented to the Bishop for him to lay his Hands upon, but such as can render an account of their Faith according to the Catechism in the said Book contained. And when the Bishop shall assign any time for the performance of that part of his Duty, every such Minister shall use his best endeavour to prepare and make able, and likewise to procure as many as he can to be then brought, and by the Bishop to be confirmed.

62. *Ministers not to Marry any Persons without Banns or Licence.*

No Minister upon pain of suspension *per triennium ipso facto*, shall celebrate Matrimony between any Persons without a Faculty or Licence granted by some of the Persons in these our Constitutions expressed, except the Banns of Matrimony have been first Published three several Sundays or Holydays in the time of Divine Service in the Parish Churches and Chapels where the said Parties dwell according to the Book of Common Prayer. Neither shall any Minister upon the like pain, under any pretence whatsoever, join any Persons so Licensed in Marriage at any unseasonable times, but only between the hours of eight and twelve in the Forenoon, nor in any private place, but either in the said Churches or Chapels where one of them

dwelleth, and likewise in time of Divine Service : Nor when Banns are thrice asked (and no Licence in that respect necessary) before the Parents or Governors of the Parties to be married, being under the Age of twenty and one years, shall either personally, or by sufficient Testimony, signify to him their Consents given to the said Marriage.

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63. *Ministers of Exempt Churches, not to Marry without Banns or Licence.*

Every Minister who shall hereafter celebrate Marriage between any Persons contrary to our said Constitutions, or any part of them under colour of any peculiar Liberty or Privilege claimed to appertain to certain Churches and Chapels, shall be suspended *per triennium*, by the Ordinary of the place where the offence shall be committed. And if any such Minister shall afterwards remove from the place where he hath committed that Fault before he be suspended, as is aforesaid, then shall the Bishop of the Diocese or Ordinary of the place where he remaineth, upon Certificate under the Hand and Seal of the other Ordinary, from whose Jurisdiction he removed, execute that Censure upon him.

64. *Ministers solemnly to bid Holydays.*

Every Parson, Vicar or Curate shall in his several Charge declare to the People, every Sunday, at the time appointed in the Communion Book, whether there be any Holydays or Fasting-days the Week following. And if any do hereafter wittingly offend herein, and being once admonished thereof by his Ordinary, shall again omit that Duty, let him be censured according to Law, until he submit himself to the due performance of it.

65. *Ministers solemnly to denounce Recusants and Excommunicates.*

All Ordinaries shall in their several Jurisdictions carefully see and give order, that as well those who for obstinate refusing to frequent Divine Service established by Public Authority within this Realm of England, as those also (especially of the better sort and condition) who for notorious Contumacy or other notable Crimes stand lawfully Excommunicate, (unless within three Months immediately after the said Sentence of Excommunication pronounced against them, they reform themselves, and obtain the benefit of Absolution), be every six Months ensuing, as well in the Parish Church as in the Cathedral Church of the Diocese in which they remain, by the Minister openly in time of Divine Service upon some Sunday, denounced and declared Excommunicate, that others may be thereby both admonished to refrain their Company and Society, and excited the rather to procure out a writ *De Excommunicato capiendo*, thereby to bring and reduce them into due Order and Obedience. Likewise the Register of every Ecclesiastical Court, shall yearly between Michaelmas and Christmas, duly certify the Archbishop of the Province of all and singular the Premises aforesaid.

66. *Ministers to confer with Recusants.*

Every Minister being a Preacher, and having any Popish Recusant or Recusants in his Parish, and thought fit by the Bishop of the Diocese, shall labour diligently with them from time to time, thereby to reclaim them from their Errors. And if he be no Preacher, or not such a Preacher, then he shall procure, if he can possibly, some that are Preachers so qualified, to take pains with them for that purpose. If he can procure none, then he shall inform the Bishop of the Diocese thereof, who shall not only appoint some neighbour Preacher or Preachers adjoining to take that labour upon them, but himself also (as his important affairs will permit him) shall use his best endeavour by instruction, persuasion, and all good means he can devise, to reclaim both them and all other within his Diocese so affected.

67. *Ministers to Visit the Sick.*

When any person is dangerously sick in any Parish, the Minister or Curate (having knowledge thereof), shall resort unto him or her (if the Disease be

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not known, or probably suspected to be infectious) to instruct and comfort them in their distress, according to the Order of the Communion Book, if he be no Preacher: or if he be a Preacher, then as he shall think most needful and convenient. And when any is passing out of this life, a Bell shall be tolled, and the Minister shall not then slack to do his last duty. And after the parties death (if it so fall out) there shall be rung no more but one short Peal, and one other before the Burial, and one other after the Burial.

68. *Ministers not to refuse to Christen or Bury.*

No Minister shall refuse or delay to Christen any Child according to the Form of the Book of Common Prayer, that is brought to the Church to him upon Sundays or Holydays, to be Christened, or to Bury any Corpse that is brought to the Church or Churchyard (convenient warning being given him thereof before) in such manner and form as is prescribed in the said Book of Common Prayer. And if he shall refuse to Christen the one or Bury the other, except the party deceased were denounced Excommunicated *Majori Excommunicatione*, for some grievous and notorious crime (and no man able to testify of his repentance), he shall be suspended by the Bishop of the Diocese from his Ministry by the space of three Months.

69. *Ministers not to defer Christening, if the Child be in danger.*

If any Minister being duly, without any manner of collusion, informed of the weakness and danger of death of any Infant Unbaptized in his Parish, and thereupon desired to go or come to the place where the said Infant remaineth, to Baptize the same, shall either wilfully refuse so to do, or of purpose, or of gross negligence shall so defer the time, as when he might conveniently have resorted to the place, and have Baptized the said Infant, it dieth through such his default Unbaptized; the said Minister shall be suspended for three Months, and before his Restitution shall acknowledge his fault, and promise before his Ordinary, that he will not wittingly incur the like again. Provided, that where there is a Curate or a Substitute, this Constitution shall not extend to the Parson or Vicar himself, but to the Curate or Substitute present.

70. *Ministers to keep a Register of Christenings, Weddings and Burials.*

In every Parish Church and Chapel within this realm, shall be provided one Parchment Book at the charge of the Parish, wherein shall be written the day and year of every Christening, Wedding and Burial, which have been in that Parish since the time that the Law was first made in that behalf, so far as the ancient Books thereof can be procured, but especially since the beginning of the Reign of the late Queen. And for the safe keeping of the said Book, the Churchwardens, at the charge of the Parish, shall provide one sure Coffe with three Locks and Keys; whereof the one to remain with the Minister, and the other two with the Churchwardens severally; so that neither the Minister without the two Churchwardens, nor the Churchwardens without the Minister, shall at any time take that Book out of the said coffe. And henceforth upon every Sabbath day, immediately after Morning or Evening Prayer, the Minister and Churchwardens shall take the said Parchment Book out of the said Coffe, and the Minister, in the presence of the Churchwardens, shall Write and Record in the said Book, the Names of all persons Christened, together with the Names and Surnames of their Parents, and also the Names of all persons Married and Buried in that Parish in the Week before, and the day and year of every such Christening, Marriage and Burial: And that done, they shall lay up that Book in the Coffe as before: And the Minister and Churchwardens unto every Page of that Book, when it shall be filled with such Inscriptions, shall subscribe their Names. And the Churchwardens shall once every year within one month after the Five and twentieth day of March, transmit unto the Bishop of the Diocese, or his Chancellor, a true copy of the Names of all persons Christened, Married or Buried in their Parish in the year before (ended the said Five and twentieth

day of March), and the certain days and months in which every such Christening, Marriage and Burial was had, to be subscribed with the Hands of the said Minister and Churchwardens, to the end the same may faithfully be preserved in the Registry of the said Bishop: which Certificate shall be received without Fee. And if the Minister or Churchwardens, shall be negligent in performance of any thing herein contained, it shall be lawful for the Bishop or his Chancellor to convent them, and proceed against every of them as Contemners of this our Constitution.

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71. *Ministers not to Preach or Administer the Communion in Private Houses.*

No Minister shall Preach or Administer the Holy Communion in any private house, except it be in times of necessity, when any being either so impotent, as he cannot go to the Church, or very dangerously sick, are desirous to be partakers of the Holy Sacrament, upon pain of Suspension for the first offence, and Excommunication for the second. Provided, that houses are here reputed for Private Houses, wherein are no Chapels dedicated and allowed by the Ecclesiastical Laws of this Realm. And provided also, under the pains before expressed, that no Chaplains do Preach or Administer the Communion in any other places but in the Chapels of the said Houses; and that also they do the same very seldom upon Sundays and Holydays: So that both the Lords and Masters of the said Houses and their Families shall at other times resort to their own Parish Churches, and there receive the Holy Communion at the least once every year.

72. *Ministers not to appoint Public or Private Fasts or Prophecies, or to Exorcise, but by Authority.*

No Minister or Ministers shall, without the Licence and Direction of the Bishop of the Diocese first obtained and had under his Hand and Seal, appoint or keep any solemn Fasts, either publicly or in any private Houses, other than such as by Law are, or by Public Authority shall be appointed, nor shall be wittingly present at any of them, under pain of Suspension for the first fault, of Excommunication for the second, and of Deposition from the Ministry for the third. Neither shall any Minister not Licensed, as is aforesaid, presume to appoint or hold any Meetings for Sermons, commonly termed by some Prophecies or Exorcises, in Market towns or other Places, under the said pains: nor without such Licence to attempt upon any pretence whatsoever, either of Possession or Obsession, by Fasting and Prayer to cast out any Devil or Devils, under pain of the imputation of Imposture or Cozenage, and Deposition from the Ministry.

73. *Ministers not to hold private Conventicles.*

Forasmuch as all Conventicles and secret Meetings of Priests and Ministers, have been ever justly accounted very hurtful to the State of the Church wherein they live: We do now ordain and constitute, That no Priests or Ministers of the Word of God, nor any other persons, shall meet together in any Private House or elsewhere, to consult upon any matter or course to be taken by them, or upon their motion or direction by any other, which may any way tend to the impeaching or depraving of the Doctrine of the Church of England, or of the Book of Common Prayer, or of any part of the Government and Discipline now established in the Church of England, under pain of Excommunication *ipso facto*.

74. *Decency in Apparel enjoined to Ministers.*

The true, ancient and flourishing Churches of Christ being ever desirous that their Prelacy and Clergy might be had as well in outward Reverence, as otherwise regarded for the Worthiness of their Ministry, did think it fit by a prescript Form of decent and comely Apparel, to have them known to the people, and thereby to receive the Honour and Estimation due to the special Messengers and Ministers of Almighty God: We therefore following their

Ministers,
their Or-
dination,
Function
and Charge.

grave Judgment, and the ancient custom of the Church of England, and hoping that in time new-fangleness of Apparel in some factious persons will die of itself, do constitute and appoint, that the Archbishops and Bishops shall not intermit to use the accustomed Apparel of their Degrees. Likewise all Deans, Masters of Colleges, Archdeacons and Prebendaries in Cathedral and Collegiate Churches, (being Priests or Deacons) Doctors in Divinity, Law and Physic, Batchelors in Divinity, Masters of Arts and Batchelors of Law, having any Ecclesiastical Living, shall usually wear Gowns with standing Collars, and Sleeves strait at the Hands, or wide Sleeves as is used in the Universities, with Hoods or Tippets of Silk or Sarcenet, and square Caps. And that all other Ministers admitted or to be admitted into that Function, shall also usually wear the like Apparel, as is aforesaid, except Tippets only. We do further in like manner ordain, That all the said Ecclesiastical Persons above mentioned, shall usually wear in their Journies Cloaks with Sleeves, commonly called Priest's Cloaks, without Gards, Welts, long Buttons or Cuts. And no Ecclesiastical Person shall wear any Coif or wrought Night-cap, but only plain Night-caps of Black Silk, Satin or Velvet. In all which particulars concerning the Apparel here prescribed, our meaning is not to attribute any Holiness or special Worthiness to the said Garments, but for decency, gravity and order as is before specified. In private Houses, and in their Studies, the said Persons Ecclesiastical may use any comely and Scholar-like Apparel, provided that it be not cut or pinckt; and that in public they go not in their Doublet and Hose, without Coats or Cassocks: And that they wear not any light coloured Stockings. Likewise poor Beneficed Men and Curates (not being able to provide themselves long Gowns) may go in short Gowns, of the fashion aforesaid.

75. *Sober Conversation required in Ministers.*

No Ecclesiastical person shall at any time, other than for their honest necessities, resort to any Taverns or Alehouses, neither shall they board or lodge in any such places. Furthermore, they shall not give themselves to any base or servile labour, or to drinking or riot, spending their time idly by day or by night playing at Dice, Cards or Tables, or any other unlawful Game: but at all times convenient, they shall hear or read somewhat of the Holy Scriptures, or shall occupy themselves with some other honest study or exercise, always doing the things which shall appertain to honesty, and endeavouring to profit the Church of God, having always in mind that they ought to excell all others in purity of life, and should be examples to the people to live well and Christianly, under pain of Ecclesiastical Censures to be inflicted with Severity, according to the qualities of their Offences.

76. *Ministers at no time to forsake their Calling.*

No man being admitted a Deacon or Minister, shall from thenceforth Voluntarily relinquish the same, nor afterward use himself in the course of his life, as a layman, upon pain of Excommunication. And the names of all such men so forsaking their Calling, the Churchwardens of the Parish where they dwell shall present to the Bishop of the Diocese, or to the Ordinary of the place, having Episcopal Jurisdiction.

School-
masters.

SCHOOLMASTERS.

77. *None to teach School without Licence.*

No Man shall teach either in Public School, or Private House, but such as shall be allowed by the Bishop of the Diocese, or Ordinary of the place, under his Hand and Seal, being found meet as well for his learning and dexterity in teaching, as for sober and honest conversation, and also for right understanding of God's true Religion, and also except he shall first subscribe to the first and third Articles aforementioned simply, and to the two first Clauses of the second Article.

78. *Curates desirous to teach, to be Licensed before others.*

School-
masters.

In what Parish Church or Chapel soever there is a Curate which is a Master of Arts, or Batchelor of Arts, or is otherwise well able to teach Youth, and will willingly so do, for the better increase of his living, and training up of Children in Principles of true Religion: We will and ordain, That a Licence to teach Youth of the Parish where he serveth, be granted to none by the Ordinary of that place, but only to the said Curate. Provided always, That this Constitution shall not extend to any Parish or Chapel in Country Towns, where there is a public School founded already: In which case we think it not meet to allow any to teach Grammar, but only him that is allowed for the said public School.

79. *The Duty of Schoolmasters.*

All Schoolmasters shall teach in English or Latin, as the Children are able to bear, the larger or shorter Catechism heretofore by public Authority set forth. And as often as any Sermon shall be upon Holy and Festival Days, within the Parish where they teach, they shall bring their Scholars to the Church where such Sermon shall be made, and there see them quietly and soberly behave themselves, and shall examine them at times convenient after their return, what they have born away of such Sermons. Upon other days, and at other times they shall train them up with such Sentences of Holy Scriptures, as shall be most expedient to induce them to all godliness: and they shall teach the Grammar set forth by King HENRY the Eighth, and continued in the times of King EDWARD the Sixth, and Queen ELIZABETH of noble memory, and none other. And if any Schoolmaster being Licensed, and having subscribed, as aforesaid, shall offend in any of the premisses, or either speak, write, or teach against any thing whereunto he hath formerly subscribed (if upon admonition by the Ordinary he do not amend and reform himself), let him be suspended from teaching School any longer.

THINGS APPERTAINING TO CHURCHES.

Things
appertaining
to Churches.

80. *The great Bible, and Book of Common Prayer, to be had in every Church.*

The Churchwardens or Questmen of every Church and Chapel, shall at the charge of the Parish provide the Book of Common Prayer, lately explained in some few points by His Majesties Authority, according to the Laws and His Highnesses Prerogative in that behalf, and that with all convenient speed, but at the furthest within Two Months after the publishing of these our Constitutions. And if any Parishes be yet unfurnished of the Bible of the largest Volume, or of the Books of Homilies allowed by Authority, the said Churchwardens shall within convenient time provide the same at the like charge of the Parish.

81. *A Font of Stone for Baptism in every Church.*

According to a former Constitution, too much neglected in many places, we appoint, That there shall be a Font of Stone in every Church and Chapel where Baptism is to be ministered; the same to be set in the Ancient usual places. In which only Font the Minister shall baptize publicly.

82. *A decent Communion Table in every Church.*

Whereas we have no doubt but that in all Churches within the Realm of England, convenient and decent Tables are provided and placed for the Celebration of the Holy Communion, We appoint that the same Tables shall from time to time be kept and repaired in sufficient and seemly manner, and

Things
appertaining
to Churches.

covered in time of Divine Service with a Carpet of Silk or other decent Stuff thought meet by the Ordinary of the place, if any question be made of it, and with a fair linen cloth at the time of the Ministration, as becometh that Table, and so stand, saving when the said Holy Communion is to be administered. At which time the same shall be placed in so good sort within the Church or Chancel, as thereby the Minister may be more conveniently heard of the Communicants in his Prayer and Ministration, and the Communicants also more conveniently and in more number may Communicate with the said Minister: and that the Ten Commandments be set upon the East end of every Church and Chapel, where the people may best see and read the same, and other chosen Sentences written upon the Walls of the said Churches and Chapels in places convenient: And likewise that a convenient Seat be made for the Minister to read Service in. All these to be done at the charge of the Parish.

83. *A Pulpit to be provided in every Church.*

The Churchwardens or Questmen at the common charge of the Parishioners in every Church, shall provide a comely and decent Pulpit, to be set in a convenient place within the same, by the discretion of the Ordinary of the place, if any question do arise, and to be there seemly kept for the Preaching of God's Word.

84. *A Chest for Alms in every Church.*

The Churchwardens shall provide and have within Three Months after the publishing of these Constitutions, a strong Chest, with a Hole in the upper part thereof, to be provided at the charge of the Parish (if there be none such already provided) having Three Keys; of which one shall remain in the custody of the Parson, Vicar or Curate, and the other two in the custody of the Churchwardens for the time being: which Chest they shall set and fasten in the most convenient place, to the intent the Parishioners may put into it their Alms for their poor Neighbours. And the Parson, Vicar or Curate, shall diligently from time to time, and especially when Men make their Testaments, call upon, exhort, and move their Neighbours to confer, and give as they may well spare to the said Chest, declaring unto them, That whereas heretofore they have been diligent to bestow much substance otherwise than God commanded, upon superstitious Uses, now they ought at this time to be much more ready to help the Poor and Needy, knowing that to relieve the Poor, is a sacrifice which pleaseth God: And that also, whatsoever is given for their comfort, is given to Christ himself, and is so accepted of him, that he will mercifully reward the same. The which Alms and Devotion of the people, the Keepers of the Keys shall Yearly, Quarterly or oftener (as need requireth) take out of the Chest, and distribute the same in the presence of most of the Parish, or six of the chief of them, to be truly and faithfully delivered to their most poor and needy Neighbours.

85. *Churches to be kept in sufficient Reparations.*

The Churchwardens or Questmen shall take care, and provide that the Churches be well and sufficiently repaired, and so from time to time kept and maintained, that the Windows be well glazed, and that the Floors be kept paved, plain and even, and all things there in such an orderly and decent sort, without dust, or any thing that may be either noisome or unseemly, as best becometh the House of God, and is prescribed in an Homily to that effect. The like care they shall take that the Churchyards be well and sufficiently repaired, fenced and maintained with Walls, Rails or Pales, as have been in each place accustomed, at their charges unto whom by Law the same appertaineth: but especially they shall see that in every meeting of the Congregation peace be well kept, and that all persons Excommunicated, and so denounced, be kept out of the Church.

86. *Churches to be surveyed, and the Decays certified to the High Commissioners.*

Things
appertaining
to Churches.

Every Dean, Dean and Chapter, Archdeacon, and others which have Authority to hold Ecclesiastical Visitations by Composition, Law or Prescription, shall survey the Churches of his or their Jurisdiction, once in every three years in his own person, or cause the same to be done, and shall from time to time within the said three years, certify the High Commissioners for Causes Ecclesiastical every year, of such defects in any of the said Churches, as he or they do find to remain unrepaired, and the Names and Surnames of the Parties faulty therein. Upon which Certificate we desire that the said High Commissioners will *ex officio mero* send for such Parties, and compel them to obey the just and lawful Decrees of such Ecclesiastical Ordinaries making such Certificates.

87. *A Terrier of Glebe-lands, and other Possessions belonging to Churches.*

We Ordain, That the Archbishops, and all Bishops within their several Dioceses, shall procure (as much as in them lieth) that a true Note and Terrier of all the Glebes, Lands, Meadows, Gardens, Orchards, Houses, Stocks, Implements, Tenements, and Portions of Tithes lying out of their Parishes (which belong to any Parsonage or Vicarage, or rural Prebend) be taken by the view of honest Men in every Parish, by the appointment of the Bishop, whereof the Minister to be one, and be laid up in the Bishop's Registry, there to be for a perpetual Memory thereof.

88. *Churches not to be Prophaned.*

The Churchwardens or Questmen, and their Assistants shall suffer no Plays, Feasts, Banquets, Suppers, Church-ales, Drinkings, Temporal Courts or Leets, Lay-juries, Musters, or any other prophane Usage to be kept in the Church, Chapel or Churchyard, neither the Bells to be rung superstitiously, upon Holydays, or Eves abrogated by the Book of Common Prayer, nor at any other times, without good cause to be allowed by the Minister of the place and by themselves.

CHURCHWARDENS OR QUESTMEN, AND SIDEMEN
OR ASSISTANTS.

Churchwardens or Questmen, and Sidemen or Assistants.

89. *The Choice of Churchwardens, and their Account.*

All Churchwardens or Questmen in every Parish, shall be chosen by the joint consent of the Minister and the Parishioners, if it may be: But if they cannot agree upon such a Choice, then the Minister shall choose one, and the Parishioners another: and without such a joint or several Choice, none shall take upon them to be Churchwardens, neither shall they continue any longer than one year in that Office, except perhaps they be chosen again in like manner. And all Churchwardens at the end of their year, or within a month after at the most, shall before the Minister and the Parishioners, give up a just account of such money as they have received, and also what particularly they have bestowed in Reparations, and otherwise for the use of the Church. And last of all, going out of their Office, they shall truly deliver up to the Parishioners whatsoever Money or other things of right belonging to the Church or Parish, which remaineth in their hands, that it may be delivered over by them to the next Churchwardens by Bill indented.

90. *The Choice of Sidemen, and their Joynt Office with Churchwardens.*

The Churchwardens or Questmen of every Parish, and two or three or more discreet persons in every Parish to be chosen for Sidemen or Assistants, by the Minister and Parishioners, if they can agree, (otherwise to be appointed by the Ordinary of the Diocese) shall diligently see, that all the Parishioners

Churchwardens or Questmen, and Sidemen or Assistants.

duly resort to their Church upon all Sundays and Holidays, and there continue the whole time of Divine Service: and none to walk or to stand idle or talking in the Church, or in the Churchyard, or the Church-porch, during that time. And all such as shall be found slack or negligent in resorting to the Church (having no great or urgent Cause of Absence), they shall earnestly call upon them: and after due monition (if they amend not) they shall present them to the Ordinary of the place. The Choice of which persons, viz. Churchwardens or Questmen, Sidemen or Assistants, shall be yearly made in Easter-week.

Parish Clerks.

PARISH CLERKS.

91. *Parish Clerks to be chosen by the Minister.*

No Parish Clerk upon any Vacation shall be chosen within the City of London, or elsewhere within the Province of Canterbury, but by the Parson or Vicar: or where there is no Parson or Vicar, by the Minister of that place for the time being: Which Choice shall be signified by the said Minister, Vicar or Parson, to the Parishioners the next Sunday following in the time of Divine Service. And the said Clerk shall be of twenty years of age at the least, and known to the said Parson, Vicar or Minister, to be of honest Conversation, and sufficient for his Reading, Writing, and also for his competent Skill in Singing (if it may be.) And the said Clerks so chosen shall have and receive their ancient Wages, without Fraud or Diminution, either at the Hands of the Churchwardens at such times as hath been accustomed, or by their own Collection according to the most ancient Custom of every Parish.

Ecclesiastical Courts belonging to the Archbishop's Jurisdiction.

ECCLESIASTICAL COURTS BELONGING TO THE ARCHBISHOP'S JURISDICTION.

92. *None to be cited into divers Courts for Probate of the same Will.*

Forasmuch as many heretofore have been by Apparitors both of inferior Courts and of the Courts of the Archbishop's Prerogative much distracted and diversely called, and summoned for Probate of Wills, or to take Administrations of the Goods of Persons dying Intestate, and are thereby vexed and grieved with many causeless and unnecessary Troubles, Molestations and Expences: We constitute and appoint, That all Chancellors, Commissaries or Officials, or any other exercising Ecclesiastical Jurisdiction whatsoever, shall at the first charge with an Oath all persons called, or voluntarily appearing before them for the Probate of any Will, or the Administration of any Goods, whether they know, or (moved by any special inducement) do firmly believe that the Party deceased (whose Testament or Goods depend now in question) had at the time of his or her death, any Goods or good Debts in any other Diocese or Dioceses, or peculiar Jurisdiction within that Province, than in that wherein the said Party died, amounting to the Value of Five Pounds. And if the said Person cited, or voluntarily appearing before him, shall upon his Oath affirm, That he knoweth, or (as aforesaid) firmly believeth, that the said Party deceased had Goods or good Debts in any other Diocese or Dioceses, or peculiar Jurisdiction within the said Province, to the value aforesaid, and particularly specify and declare the same; then shall he presently dismiss him, not presuming to intermeddle with the Probate of the said Will, or to grant Administration of the Goods of the Party so dying Intestate: Neither shall he require or exact any other Charges of the said Parties more than such only as are due for the Citation, and other Process had and used against the said Parties upon their further Contumacy; but shall openly and plainly declare and profess, That the said Cause belongeth to the Prerogative of the Archbishop of that Province, willing and admonishing the Party to prove the

said Will, or require Administration of the said Goods in the Court of the said Prerogative, and to exhibit before him the said Judge the Probate or Administration under the Seal of the Prerogative within forty days next following. And if any Chancellor, Commissary, Official or other exercising Ecclesiastical Jurisdiction whatsoever, or any their Register shall offend herein, let him be *ipso facto* suspended from the execution of his Office, not to be absolved or released until he have restored to the Party all Expences by him laid out contrary to the tenor of the Premises: and every such Probate of any Testament or Administration of Goods so granted, shall be held void and frustrate to all Effects of the Law whatsoever.

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Courts be-
longing to the
Archbishop's
Jurisdiction.

Furthermore, we charge and enjoin, that the Register of every inferior Judge do without all difficulty or delay, certify and inform the Apparitor of the Prerogative Court, repairing unto him once a month and no oftener, what Executors or Administrators have been by his said Judge for the Incompetency of his own Jurisdiction, dismissed to the said Prerogative Court within the month next before, under pain of a month's Suspension from the Exercise of his Office, for every default therein. Provided that this Canon or any thing therein contained, be not prejudicial to any Composition between the Archbishop and any Bishop, or other Ordinary, nor to any inferior Judge that shall grant any Probate of Testament or Administration of Goods to any Party that shall voluntarily desire it, both out of the said inferior Court, and also out of the Prerogative. Provided likewise, that if any Man die *in itinere*, the Goods that he hath about him at that present, shall not cause his Testament or Administration to be liable unto the Prerogative Court.

93. *The Rate of Bona notabilia liable to the Prerogative Court.*

Furthermore, we decree and ordain, That no Judge of the Archbishop's Prerogative shall henceforward Cite or cause to be Cited *ex officio* any person whatsoever to any of the aforesaid intents, unless he have knowledge that the party Deceased was at the time of his Death possessed of Goods and Chattels in some other Diocese or Dioceses, or peculiar Jurisdiction within that Province than in that wherein he died, amounting to the value of five pounds at the least: decreeing and declaring, that whoso hath not Goods in divers Dioceses to the said sum or value, shall not be accounted to have *bona notabilia*. Always Provided, That this Clause here, and in the former Constitution mentioned, shall not prejudice those Dioceses where by composition or custom *bona notabilia* are rated at a greater Sum. And if any Judge of the Prerogative Court, or any his Surrogate or his Register or Apparitor, shall Cite or cause any person to be cited into his Court contrary to the tenor of the Premises, he shall restore to the party so cited all his costs and charges, and the Acts and Proceedings in that behalf shall be held void and frustrate. Which Expences if the said Judge or Register, or Apparitor shall refuse accordingly to pay, he shall be Suspended from the Exercise of his Office, until he yield to the performance thereof.

94. *None to be cited into the Arches or Audience, but Dwellers within the Archbishop's Diocese or Peculiars.*

No Dean of the Arches, nor Official of the Archbishop's Consistory, nor any Judge of the Audience, shall henceforward in his own Name, or in the Name of the Archbishop either *ex officio*, or at the instance of any party, originally cite, summon, or any way compel, or procure to be cited, summoned or compelled any person which dwelleth not within the particular Diocese or Peculiar of the said Archbishop, to appear before him or any of them for any Cause or Matter whatsoever belonging to Ecclesiastical Cognizance, without the Licence of the Diocesan first had and obtained in that behalf, other than in such particular Cases only as are expressly excepted and reserved in and by a Statute, Ann. 23 H. 8, cap. 9. And if any of the said Judges shall offend herein, he shall for every such Offence be Suspended from the Exercise of his Office, for the space of three whole Months.

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Courts be-
longing to the
Archbishop's
Jurisdiction.

95. *The Restraint of double Quarrels.*

Albeit, by former Constitutions of the Church of England, every Bishop hath had two Months' space to enquire and inform himself of the Sufficiency and Qualities of every Minister, after he hath been presented unto him to be Instituted into any Benefice: Yet for the avoiding of some Inconveniences, we do now abridge and reduce the said two Months unto eight and twenty days only. In respect of which Abridgment, we do ordain and appoint, that no double Quarrel shall hereafter be granted out of any of the Archbishop's Courts, at the Suit of any Minister whosoever, except he shall first take his personal Oath, that the said eight and twenty days at the least are expired, after he first tendered his Presentation to the Bishop, and that he refused to grant him Institution thereupon: or shall enter Bonds with sufficient Sureties to prove the same to be true, under pain of Suspension of the Granter thereof from the Execution of his Office, for half a year *toties quoties*, to be denounced by the said Archbishop, and Nullity of the double Quarrel aforesaid, so unduly procured, to all intents and purposes whatsoever. Always provided, that within the said eight and twenty days, the Bishop shall not institute any other to the prejudice of the said Party before presented, *sub pœna nullitatis*.

96. *Inhibitions not to be granted without the Subscription of an Advocate.*

That the Jurisdictions of Bishops may be preserved (as near as may be) entire and free from Prejudice, and that for the behoof of the Subjects of this Land, better Provision be made, that henceforward they be not grieved with frivolous and wrongful Suits and Molestations: It is Ordained and Provided, that no Inhibition shall be granted out of any Court belonging to the Archbishop of Canterbury, at the instance of any party, unless it be Subscribed by an Advocate practising in the said Court: which the said Advocate shall do freely, not taking any fee for the same, except the party prosecuting the Suit do voluntarily bestow some Gratuity upon him for his Counsel and Advice in the said Cause. The like Course shall be used in granting forth any Inhibition, at the instance of any party, by the Bishop or his Chancellor against the Archdeacon, or any other person exercising Ecclesiastical Jurisdiction: And if in the Court or Consistory of any Bishop there be no Advocate at all, then shall the Subscription of a Proctor, practising in the same Court, be held sufficient.

97. *Inhibitions not to be granted until the Appeal be exhibited to the Judge.*

It is further ordered and decreed, that henceforward no Inhibition be granted by occasion of any interlocutory Decree, or in any Cause of Correction whatsoever, except under the Form aforesaid: And moreover, That before the going out of any such Inhibition, the Appeal itself, or a copy thereof (avouched by Oath to be just and true) be exhibited to the Judge, or his lawful Surrogate, whereby he may be fully informed, both of the Quality of the Crime, and of the Cause of the Grievance, before the granting forth of the said Inhibition. And every Appellant or his lawful Proctor shall before the obtaining of any such inhibition, show and exhibit to the Judge or his Surrogate in Writing, a true Copy of those Acts wherewith he complaineth himself to be aggrieved, and from which he appealeth, or shall take a Corporal Oath that he hath performed his diligence and true endeavour for the obtaining of the same, and could not obtain it at the hands of the Register in the Country, or his Deputy, tendering him his Fee. And if any Judge or Register shall either procure or permit any Inhibition to be sealed, so as is said, contrary to the Form and Limitation above specified, let him be Suspended from the Execution of his Office, for the space of three Months: If any Proctor, or other person whatsoever by his Appointment, shall offend in any of the Premises, either by making or sending out any Inhibition, contrary to the tenour of the said Premises, let him be removed from the Exercise of his Office for the space of a whole Year, without hope of release or restoring.

98. *Inhibitions not to be granted to Factious Appellants, unless they first Subscribe.*

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Forasmuch as they who break the Laws cannot in reason claim any benefit or protection by the same: We decree and appoint, that after any Judge Ecclesiastical hath proceeded judicially against obstinate and factious persons, and Contemnors of Ceremonies, for not observing the Rites and Orders of the Church of England, or for contempt of public Prayer, no Judge *ad quem* shall admit or allow any his or their appeals, unless he having first seen the Original Appeal, the party Appellant do first personally promise and avow, that he will faithfully keep and observe all the Rites and Ceremonies of the Church of England, as also the prescript Form of Common Prayer, and do likewise Subscribe to the three Articles formerly by us specified and declared.

99. *None to Marry within the Degrees Prohibited.*

No Person shall Marry within the degrees prohibited by the Laws of God, and expressed in a Table set forth by Authority in the year of our Lord God 1563, and all Marriages so made and contracted, shall be adjudged incestuous and unlawful, and consequently shall be dissolved as void from the beginning, and the parties so Married shall by course of Law be separated. And the aforesaid Table shall be in every Church publicly set up and fixed at the charge of the Parish.

100. *None to Marry under Twenty-one Years, without their Parent's Consent.*

No Children, under the Age of One and twenty Years complete, shall Contract themselves or Marry without the Consent of their Parents, or of their Guardians and Governors, if their Parents be deceased.

101. *By whom Licences to Marry without Banns shall be granted, and to what sort of Persons.*

No Faculty or Licence shall be henceforth granted for Solemnization of Matrimony betwixt any parties, without thrice open Publication of the Banns according to the Book of Common Prayer, by any Person exercising any Ecclesiastical Jurisdiction, or claiming any Privileges in the Right of their Churches; but the same shall be granted only by such as have Episcopal Authority, or the Commissary for Faculties, Vicars General of the Archbishops and Bishops, *sede plena* or *sede vacante*, the Guardian of the Spiritualities or Ordinaries exercising of right Episcopal Jurisdiction in their several Jurisdictions respectively, and unto such persons only as be of good State and Quality, and that upon good Caution and Security taken.

102. *Security to be taken at the granting of such Licences, and under what Conditions.*

The Security mentioned shall contain these Conditions; First, that at the time of the granting every such Licence, there is not any Impediment of Precontract, Consanguinity, Affinity, or other Lawful Cause to hinder the said Marriage. Secondly, that there is not any Controversy or Suit depending in any Court before any Ecclesiastical Judge touching any Contract or Marriage of either of the said parties with any other. Thirdly, that they have obtained thereunto the express Consent of their Parents (if they be living) or otherwise of their Guardians or Governors. Lastly, that they shall celebrate the said Matrimony publicly in the Parish Church or Chapel where one of them dwelleth and in no other place, and that between the Hours of Eight and Twelve in the Forenoon.

103. *Oaths to be taken for the Conditions.*

For the avoiding of all Fraud and Collusion in the obtaining of such Licences and Dispensations: We further constitute and appoint, That before any Licence for the Celebration of Matrimony, without Publication of Banns,

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be had or granted, it shall appear to the Judge by the Oaths of two sufficient Witnesses, one of them to be known either to the Judge himself, or to some other person of good Reputation then present, and known likewise to the said Judge, that the express Consent of the Parents or Parent, if one be dead, or Guardians or Guardian of the parties is thereunto had and obtained. And furthermore that one of the Parties personally swear, that he believeth there is no Let or Impediment of Precontract, Kindred, or Alliance, or of any other lawful Cause whatsoever, nor any Suit Commenced in any Ecclesiastical Court, to bar or hinder the Proceeding of the said Matrimony, according to the Tenour of the aforesaid Licence.

104. *An Exception for those that are in Widowhood.*

If both the Parties which are to Marry being in Widowhood, do seek a Faculty for the forbearing of Banns, then the Clauses before-mentioned requiring the Parents' Consents, may be omitted; but the Parishes where they dwell, both shall be expressed in the Licence, as also the Parish named where the Marriage shall be celebrated. And if any Commissary for Faculties, Vicars General or other the said Ordinaries shall offend in the Premises, or any part thereof, he shall, for every time so offending, be Suspended from the execution of his Office for the space of six months; and every such Licence or Dispensation shall be held void to all effects and purposes, as if there had never been any such granted, and the parties Marrying, by virtue thereof, shall be subject to the punishments which are appointed for Clandestine Marriages.

105. *No Sentence for Divorce to be given upon the sole Confession of the Parties.*

Forasmuch as Matrimonial Causes have been always reckoned and reputed amongst the weightiest, and therefore require the greater Caution when they come to be handled and debated in Judgment, especially in Causes wherein Matrimony, having been in the Church duly solemnized, is required upon any suggestion or pretext whatsoever to be Dissolved or Annulled: We do straitly Charge and Injoin, that in all proceedings to Divorce and Nullities of Matrimony, good Circumspection and Advice be used, and that the Truth may (as far as is possible) be sifted out by the Deposition of Witnesses, and other lawful Proofs and Evictions, and that Credit be not given to the sole Confession of the Parties themselves, howsoever taken upon Oath, either within or without the Court.

106. *No Sentence for Divorce to be given but in open Court.*

No sentence shall be given either for Separation *a thoro et mensa*, or for annulling of pretended Matrimony, but in open Court, and in the Seat of Justice, and that with the Knowledge and Consent either of the Archbishop within his Province, or of the Bishop within his Diocese, or of the Dean of the Arches, the Judge of the Audience of Canterbury, or of the Vicars General, or other principal Officials, or *sede vacante* of the Guardians of the Spiritualities, or other Ordinaries to whom of right it appertaineth, in their several Jurisdictions and Courts, and concerning them only that are then dwelling under their Jurisdictions.

107. *In all Sentences for Divorce, Bond to be taken for not Marrying, during each other's Life.*

In all Sentences pronounced only for Divorce and Separation *a thoro et mensa*, there shall be a Caution and Restraint inserted in the Act of the said Sentence, That the parties so separated, shall live chastly and continently, neither shall they, during each other's life, contract matrimony with other person. And for the better Observation of this last Clause, the said sentence of Divorce shall not be pronounced, until the party or parties requiring the same have given good and sufficient caution and security into the Court, that they will not any way break or transgress the said Restraint or Prohibition.

108. *The Penalty for Judges offending in the Premises.*

And if any judge, giving Sentence of Divorce or Separation, shall not fully keep and observe the Premises, he shall be, by the Archbishop of the Province, or by the Bishop of the Diocese, Suspended from the exercise of his Office for the space of a whole Year, and the Sentence of Separation so given contrary to the Form aforesaid, shall be held void to all intents and purposes of the Law, as if it had not at all been given or pronounced.

Ecclesiastical Courts belonging to the Archbishop's Jurisdiction.

ECCLESIASTICAL COURTS BELONGING TO THE JURISDICTION OF BISHOPS AND ARCHDEACONS, AND THE PROCEEDINGS IN THEM.

Courts belonging to Bishops, &c.

109. *Notorious Crimes and Scandals to be certified into Ecclesiastical Courts by Presentment.*

If any offend their brethren, either by Adultery, Whoredom, Incest or Drunkenness, or by Swearing, Ribaldry, Usury, or any other Uncleaness and Wickedness of Life, the Churchwardens or Questmen, and Sidemen, in their next Presentments to their Ordinaries, shall faithfully present all and every of the said Offenders, to the intent that they and every of them may be punished by the severity of the Laws, according to their deserts; and such notorious Offenders shall not be admitted to the holy Communion till they be reformed.

110. *Schismatics to be presented.*

If the Churchwardens or Questmen, or Assistants, do or shall know any Man within their Parish or elsewhere, that is a hinderer of the Word of God to be read or sincerely preached, or of the execution of these our Constitutions, or a Fautor of any usurped or foreign power, by the Laws of this Realm justly rejected and taken away, or a Defender of Popish and Erroneous Doctrine: they shall detect and present the same to the Bishop of the Diocese or Ordinary of the place, to be Censured and Punished according to such Ecclesiastical Laws as are prescribed in that behalf.

111. *Disturbers of Divine Service to be presented.*

In all Visitations of Bishops and Archdeacons, the Churchwardens or Questmen and Sidemen, shall truly and personally present the names of all those which behave themselves rudely and disorderly in the Church, or which by untimely ringing of Bells, by walking, talking, or other noise, shall hinder the Minister or Preacher.

112. *Not Communicants at Easter to be presented.*

The Minister, Churchwardens, Questmen and Assistants of every Parish Church and Chapel, shall yearly within forty days after Easter exhibit to the Bishop or his Chancellor, the names and surnames of all the Parishioners, as well men as women, which being of the age of sixteen years, received not the Communion at Easter before.

113. *Ministers may present.*

Because it often cometh to pass, that the Churchwardens, Sidemen, Questmen, and such other Persons of the Laity as are to take care for the suppressing of Sin and Wickedness in their several Parishes, as much as in them lieth, by Admonition, Reprehension, and Denunciation to their Ordinaries, do forbear to Discharge their Duties therein, either through fear of their Superiors, or through negligence, more than were fit, the licentiousness of these times considered: We ordain, That hereafter every Parson and Vicar, or in the lawful absence of any Parson or Vicar, then their Curates and Substitutes, may joyn in every Presentment with the said Churchwardens, Sidemen, and the rest above-mentioned at the times hereafter limited, if they the

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said Churchwardens and the rest will present such Enormities as are apparent in the Parish: or if they will not, then every such Parson and Vicar, or in their absence, as aforesaid, their Curates may themselves present to their Ordinaries at such times and when else they think it meet, all such Crimes as they have in charge, or otherways, as by them (being the persons that should have the chief care for the suppressing of Sin and Impiety in their Parishes) shall be thought to require due Reformation. Provided always, that if any man confess his secret and hidden Sins to the Minister for the unburdening of his Conscience, and to receive spiritual consolation and ease of mind from him, We do not any way bind the said Minister by this our Constitution, but do straitly Charge and Admonish him, that he do not at any time reveal and make known to any person whatsoever, any Crime or Offence so committed to his trust and secrecy (except they be such Crimes as by the Laws of this Realm his own life may be called into question for concealing the same) under pain of Irregularity.

114. *Ministers shall present Recusants.*

Every Parson, Vicar or Curate, shall carefully inform themselves every year hereafter, how many Popish Recusants, Men, Women and Children above the age of thirteen years; and how many being Popishly given (who though they come to the Church, yet do refuse to receive the Communion) are Inhabitants, or make their abode either as Sojourners or common Guests in any of their several Parishes, and shall set down their true Names in Writing (if they can learn them) or otherwise such Names as for the time they carry, distinguishing the absolute Recusants from half Recusants: and the same, so far as they know or believe, so distinguished and set down under their hands, shall truly present to their Ordinaries before the Feast of the Nativity next ensuing, under pain of Suspension to be inflicted upon them by their said Ordinaries, and so every year hereafter upon the like pain, before the Feast of Saint John Baptist. Also we Ordain, That all such Ordinaries, Chancellors, Commissaries, Archdeacons, Officials, and all other Ecclesiastical Officers, to whom the said Presentments shall be exhibited, shall likewise within one Month after the receipt of the same, under pain of Suspension by the Bishop from the execution of their Offices for the space of half a year (as often as they shall offend therein) deliver them, or cause to be delivered to the Bishop respectively; who shall also exhibit them to the Archbishop within six Weeks, and the Archbishop to His Majesty within other six Weeks after he hath received the said Presentments.

115. *Ministers and Churchwardens not to be sued for Presenting.*

Whereas for the Reformation of criminous Persons and Disorders in every Parish, the Churchwardens, Questmen, Sidemen, and such other Church Officers are sworn, and the Minister charged to present as well the Crimes and Disorders committed by the said criminous Persons, as also the common fame which is spread abroad of them, whereby they are often maligned, and sometimes troubled by the said Delinquents or their Friends: We do admonish and exhort all Judges both Ecclesiastical and Temporal, as they regard and reverence the fearful Judgment-seat of the highest Judge, that they admit not in any of their Courts, any Complaint, Plea, Suit or Suits against any such Churchwardens, Questmen, Sidemen or other Church Officers, for making any such Presentments, nor against any Minister for any Presentment that he shall make: all the said Presentments tending to the restraint of shameless Impiety, and considering that the Rules both of Charity and Government do presume that they did nothing therein of malice, but for the Discharge of their Consciences.

116. *Churchwardens not bound to present oftener than twice a Year.*

No Churchwardens, Questmen, or Sidemen of any Parish, shall be enforced to exhibit their Presentments to any having Ecclesiastical Jurisdiction, above once in every year, where it hath been no oftener used, nor above twice in

any Diocese whatsoever, except it be at the Bishop's Visitation. For the which Presentments of every Parish Church or Chapel, the Register of any Court, where they are to be exhibited, shall not receive in one year above Four Pence, under pain, for every Offence therein, of Suspension from the execution of his Office for the space of a month *toties quoties*. Provided always, that as good occasion shall require, it shall be lawful for every Minister, Churchwardens and Sidemen, to present Offenders as oft as they shall think meet. And likewise for any godly disposed Person, or for any Ecclesiastical Judge, upon knowledge or notice given unto him or them, of any enormous Crime within his jurisdiction, to move the Minister, Churchwardens or Sidemen, as they tender the Glory of God and Reformation of Sin, to present the same, if they shall find sufficient cause to induce them thereunto, that it may be in due time punished and reformed. Provided, that for these voluntary Presentments, there be no Fee required or taken of them under the pain aforesaid.

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117. *Churchwardens not to be troubled for not Presenting oftener than twice a Year.*

No Churchwardens, Questmen, or Sidemen shall be called or cited, but only at the said time or times before limited, to appear before any Ecclesiastical Judge whosoever, for refusing at other times to Present any Faults committed in their Parishes, and punishable by Ecclesiastical Laws. Neither shall they, nor any of them, after their Presentments exhibited at any of those times, be any further troubled for the same, except upon manifest and evident Proof it may appear, that they did then willingly and wittingly omit to present some such publick Crime or Crimes as they knew to be committed, or could not be ignorant that there was then a public fame of them, or unless there be very just cause to call them for the Explanation of their former Presentments. In which case of wilful Omission, their Ordinaries shall proceed against them in such sort as in causes of wilful Perjury in a Court Ecclesiastical it is already by Law provided.

118. *The old Churchwardens to make their Presentments before the new be sworn.*

The office of all Churchwardens and Sidemen shall be reputed ever hereafter to continue until the new Churchwardens, that shall succeed them, be sworn, which shall be the first Week after Easter, or some Week following, according to the direction of the Ordinary. Which time so appointed, shall always be one of the two times in every year, when the Minister and Churchwardens, and Sidemen of every Parish shall exhibit to their several Ordinaries, the Presentments of such Enormities as have hapned in their Parishes since their last Presentments. And this duty they shall perform before the newly chosen Churchwardens and Sidemen be sworn, and shall not be suffered to pass over the said Presentments to those that are newly come into Office, and are by intendment ignorant of such Crimes, under pain of those Censures which are appointed for the Reformation of such Dalliers and Dispensers with their own Consciences and Oaths.

119. *Convenient time to be assigned for framing Presentments.*

For the avoiding of such inconveniencies as heretofore have hapned by the hasty making of Bills of Presentments, upon the days of the Visitation and Synods, it is Ordered, That always hereafter every Chancellor, Archdeacon, Commissary and Official, and every other Person having Ecclesiastical Jurisdiction, at the ordinary time when the Churchwardens are sworn; and the Archbishop and Bishops when he or they do summon their Visitation, shall deliver, or cause to be delivered to the Churchwardens, Questmen and Sidemen of every Parish, or to some of them, such Books of Articles, as they or any of them shall require, for the year following, the said Churchwardens, Questmen and Sidemen, to ground their Presentments upon, at such times as they are to exhibit them. In which Book shall be contained

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the Form of the Oath which must be taken immediately before every such Presentment: to the intent that having beforehand time sufficient, not only to peruse and consider what their said Oath shall be, but the Articles also whereupon they are to ground their Presentments, they may frame them at home both advisedly and truly, to the discharge of their own Consciences, after they are Sworn, as becometh honest and godly Men.

120. *None to be cited into Ecclesiastical Courts by Process of Quorum nomina.*

No Bishop, Chancellor, Archdeacon, Official, or other Ecclesiastical Judge, shall suffer any general Processes of *Quorum nomina*, to be sent out of his Court: except the Names of all such as thereby are to be cited, shall be first expressly entred by the Hand of the Register, or his Deputy, under the said Processes, and the said Processes and Names be first Subscribed by the Judge, or his Deputy, and his Seal thereto affixed.

121. *None to be cited into several Courts for one Crime.*

In Places where the Bishop and Archdeacon do, by prescription or composition, Visit at several times in one and the same year, lest for one and the self same fault any of His Majesties Subjects should be challenged and molested in divers Ecclesiastical Courts: We Order and Appoint, That every Archdeacon or his Official, within one month after the Visitation ended that year, and the Presentments received, shall certifie under his Hand and Seal, to the Bishop or his Chancellor, the Names and Crimes of all such as are detected and presented in his said Visitation, to the end the Chancellor shall thenceforth forbear to convent any Person for any Crime or Cause so detected or presented to the Archdeacon. And the Chancellor within the like time after the Bishop's Visitation ended, and Presentments received, shall under his Hand and Seal Signifie to the Archdeacon or his Official, the Names and Crimes of all such Persons which shall be detected or presented unto him in that Visitation, to the same intent as is aforesaid. And if these Officers shall not certifie each other as is here prescribed, or after such Certificate shall intermeddle with the Crimes or Persons detected and presented in each other Visitation; then every of them so offending shall be Suspended from all exercise of his Jurisdiction, by the Bishop of the Diocese, until he shall repay the Costs and Expences which the Parties grieved have been at by that Vexation.

122. *No Sentence of Deprivation or Disposition to be pronounced against a Minister, but by the Bishop.*

When any Minister is complained of in any Ecclesiastical Court belonging to any Bishop of his Province for any Crime, the Chancellor, Commissary, Official, or any other having Ecclesiastical Jurisdiction, to whom it shall appertain, shall expedite the cause by Processes and other Proceedings against him: and upon Contumacy, for not appearing, shall first Suspend him, and afterward, his Contumacy continuing, Excommunicate him. But if he appear and submit himself to the course of Law, then the Matter, being ready for Sentence, and the Merits of his Offence exacting by Law, either Deprivation from his Living, or Deposition from the Ministry, no such Sentence shall be Pronounced by any Person whosoever, but only by the Bishop, with the Assistance of his Chancellor, the Dean (if they may conveniently be had), and some of the Prebendaries, if the Court be kept near the Cathedral Church, or of the Archdeacon, if he may be had conveniently, and two other at the least grave Ministers and Preachers to be called by the Bishop, when the Court is kept in other Places.

123. *No Act to be sped but in open Court.*

No Chancellor, Commissary, Archdeacon, Official, or any other Person using Ecclesiastical Jurisdiction whosoever, shall speed any judicial Act, either of contentious or voluntary Jurisdiction, except he have the ordinary

Register of that Court, or his lawful Deputy: or if he or they will not, or cannot be present, then such Persons as by law are allowed in that behalf to write or speed the same, under the pain of Suspension *ipso facto*. Courts belonging to Bishops, &c.

124. *No Court to have more than one Seal.*

No Chancellor, Commissary, Archdeacon, Official, or any other exercising Ecclesiastical Jurisdiction, shall without the Bishop's consent have any more Seals than one, for the Sealing of all Matters incident to his Office: Which Seal shall always be kept either by himself, or by his lawful Substitute exercising Jurisdiction for him, and remaining within the Jurisdiction of the said Judge, or in the City or principal Town of the County. This Seal shall contain the Title of that Jurisdiction which every of the said Judges or their Deputies do execute.

125. *Convenient Places to be chosen for the keeping of Courts.*

All Chancellors, Commissaries, Archdeacons, Officials, and all other exercising Ecclesiastical Jurisdiction, shall appoint such meet Places for the keeping of their Courts by the Assignment or Approbation of the Bishop of the Diocese, as shall be convenient for Entertainment of those that are to make their Appearance there, and most indifferent for their travel. And likewise they shall keep and end their Courts in such convenient time, as every Man may return homewards in as due season as may be.

126. *Peculiar and Inferiour Courts to exhibit the original Copies of Wills into the Bishop's Registry.*

Whereas Deans, Archdeacons, Prebendaries, Parsons, Vicars, and others exercising Ecclesiastical Jurisdiction, claim Liberty to Prove the last Wills and Testaments of Persons deceased within their several Jurisdictions, having no known nor certain Registers, nor Publick Place to keep their Records in, by reason whereof many Wills, Rights, and Legacies, upon the death or change of such Persons, and their private Notaries, miscarry and cannot be found, to the great Prejudice of His Majesties Subjects: We therefore Order and Injoyn that all such Possessors and Exercisers of peculiar Jurisdiction, shall once in every year exhibit into the publick Registry of the Bishop of the Diocese, or of the Dean and Chapter, under whose Jurisdiction the said Peculiars are, every original Testament of every Person in that time deceased, and by them Proved in their several peculiar Jurisdictions, or a true Copy of every such Testament Examined, Subscribed and Sealed by the peculiar Judge and his Notary. Otherwise if any of them fail so to do, the Bishop of the Diocese, or Dean and Chapter, unto whom the said Jurisdictions do respectively belong, shall Suspend the said Parties and every of them from the exercise of all such peculiar Jurisdiction, until they have performed this our Constitution.

JUDGES ECCLESIASTICAL AND THEIR SURROGATES.

127. *The Quality and Oath of Judges.*

No man shall hereafter be admitted a Chancellor, Commissary or Official, to exercise any Ecclesiastical Jurisdiction, except he be of the full age of Six and twenty years at the least, and one that is Learned in the Civil and Ecclesiastical Laws, and is at the least a Master of Arts, or Batchelor of Law, and is reasonably well practised in the course thereof, as likewise well affected, and zealously bent to Religion, touching whose Life and Manners no evil Example is had, and except before he Enter into or Execute any such Office, he shall take the Oath of the King's Supremacy in the presence of the Bishop, or in the open Court, and shall subscribe to the Articles of Religion agreed upon in the Convocation in the year One thousand five hundred sixty and two, and shall also swear that he will, to the uttermost of his

Judges Ecclesiastical and their Surrogates.

Judges Ecclesiastical and their Surrogates.

understanding, deal uprightly and justly in his office, without respect or favour of Reward: the said Oaths and Subscription to be Recorded by a Register then present. And likewise all Chancellors, Commissaries, Officials, Registers, and all other that do now Possess or Execute any Places of Ecclesiastical Jurisdiction, or Service, shall before Christmas next, in the presence of the Archbishop or Bishop, or in open Court, under whom or where they exercise their Offices, take the same Oaths, and Subscribe as before is said: or upon refusal so to do, shall be Suspended from the execution of their Offices, until they shall take the said Oaths, and Subscribe, as aforesaid.

128. *The Quality of Surrogates.*

No Chancellor, Commissary, Archdeacon, Official, or any other Person using Ecclesiastical Jurisdiction, shall at any time substitute in their absence any to keep any Court for them, except he be either a grave Minister and a Graduate, or a licensed publick Preacher, and a beneficed Man near the Place where the Courts are kept, or a Batchelor of Law, or a Master of Arts at least, who hath some skill in the Civil and Ecclesiastical Law, and is a Favourer of true Religion, and a Man of Modest and Honest Conversation, under pain of Suspension, for every time that they offend therein, from the Execution of their Offices for the space of Three Months *toties quoties*: And he likewise that is deputed, being not qualified as is before expressed, and yet shall presume to be a Substitute to any Judge, and shall keep any Court, as is aforesaid, shall undergo the same Censure in manner and form as is before expressed.

Proctors.

PROCTORS.

129. *Proctors not to retain Causes without the lawful Assignment of the Parties.*

None shall Procure in any Cause whatsoever, unless he be thereunto Constituted and Appointed by the Party himself, either before the Judge and by Act in Court, or unless in the beginning of the Suit, he be by a true and sufficient Proxy thereunto warranted and enabled. We call that Proxy sufficient, which is strengthened and confirmed by some authentical Seal, the Parties Approbation, or at least his Ratification therewithal concurring. All which Proxies shall be forthwith by the said Proctors exhibited into the Court, and be safely kept and preserved by the Register in the public Registry of the said Court. And if any Register or Proctor shall offend herein, he shall be seclused from the exercise of his Office for the space of Two Months, without hope of Release or Restoring.

130. *Proctors not to retain Causes without the Counsel of an Advocate.*

For Lessening and Abridging the multitude of Suits, and Contentions, as also for Preventing the Complaints of Suitors in Courts Ecclesiastical, who many times are overthrown by the oversight and negligence, or by the ignorance and insufficiency of Proctors; and likewise for the furtherance and increase of Learning, and the advancement of Civil and Canon Law, following the laudable Customs heretofore observed in the Courts pertaining to the Archbishop of Canterbury, We Will and Ordain, That no Proctor exercising in any of them shall entertain any Cause whatsoever, and keep and retain the same for Two Court-days, without the Counsel and Advice of an Advocate, under Pain of a Year's Suspension from his Practice: neither shall the Judge have Power to Release or Mitigate the said Penalty, without express Mandate and Authority from the Archbishop aforesaid.

131. *Proctors not to conclude in any Cause without the Knowledge of an Advocate.*

No Judge in any of the said Courts of the Archbishop, shall admit any Libel, or any other matter, without the Advice of an Advocate admitted to Practise

in the same Court, or without his Subscription: neither shall any Proctor conclude any Cause depending, without the Knowledge of the Advocate Retained and Feed in the Cause: which if the Proctor shall do, or procure to be done, or shall by any colour whatsoever defraud the Advocate of his Duty or Fee, or shall be negligent in repairing to the Advocate, and requiring his Advice, what course is to be taken in the Cause, he shall be suspended from all Practice for the space of Six Months, without hope of being thereunto Restored, before the said Term be fully compleat.

Proctors.

132. *Proctors Prohibited the Oath In Animam Domini sui.*

Forasmuch as in the Probate of Testaments and Suits for Administration of the Goods of Persons dying Intestate, the Oath usually taken by Proctors of Courts *In animam constituentis*, is found to be inconvenient: We do therefore Decree and Ordain, That every Executor or Suitor for Administration, shall Personally repair to the Judge in that behalf, or his Surrogate, and in his own Person (and not by Proctor) take the Oath accustomed in these cases. But if by reason of sickness or age, or any other just Let or Impediment, he be not able to make his Personal Appearance before the Judge: it shall be lawful for the Judge (there being Faith first made by a Credible Person, of the Truth of his said Hindrance or Impediment) to Grant a Commission to some Grave Ecclesiastical Person, abiding near the Party aforesaid, whereby he shall give Power and Authority to the said Ecclesiastical Person in his stead, to Minister the accustomed Oath above mentioned, to the Executor or Suitor for such Administration, requiring his said Substitute, that by a faithful and trusty Messenger he certifie the said Judge truly and faithfully what he had done therein. Lastly, we Ordain and Appoint, That no Judge or Register, shall in any wise receive for the Writing, Drawing or Sealing of any such Commission, above the Sum of Six shillings and eight pence; whereof one Moiety to be for the Judge, and the other for the Register of the said Court.

133. *Proctors not to be clamorous in Court.*

Forasmuch as it is found by experience, that the loud and confused Cries and Clamours of Proctors in the Courts of the Archbishop, are not only troublesome and offensive to the Judges and Advocates, but also give occasion to the standers by, of Contempt and Calumny toward the Court itself: that more Respect may be had to the Dignity of the Judge, than heretofore, and that Causes may more easily and commodiously be handled and dispatched, we charge and enjoyn, That all Proctors in the said Courts do especially intend, that the Acts be faithfully entred and set down by the Register, according to the Advice and Direction of the Advocate, that the said Proctors refrain loud Speech and Brawling, and behave themselves quietly and modestly, and that when either the Judges or Advocates, or any of them shall happen to speak, they presently be silent, upon pain of Silencing for two whole Terms then immediately following every such Offence of theirs. And if any of them shall the second time offend herein, and after due Monition shall not reform himself; let him be for ever removed from his Practice.

REGISTERS.

Registers.

134. *Abuses to be Reformed in Registers.*

If any Register, or his Deputy, or Substitute whatsoever, shall receive any Certificate without the knowledge and consent of the Judge of the Court, or willingly omit to cause any person cited to appear upon any Court-day to be called, or unduly put off, and defer the Examination of Witnesses to be Examined by a Day set and assigned by the Judge, or do not obey and observe the judicial and lawful Monition of the said Judge, or omit to write, or cause to be written such Citations and Decrees as are to be put in

Registers.

execution and set forth before the next Court day, or shall not cause all Testaments exhibited into his Office, to be Registered within a convenient time, or shall set down or enact as decreed by the Judge any thing false, or conceived by himself, and not so ordered or decreed by the Judge, or in the Transmission of Processes to the Judge *Ad quem*, shall add, or insert any falsehood or untruth, or omit any thing therein either by Cunning, or by gross Negligence, or in Causes of Instance, or promoted of Office, shall receive any Reward in favour of either party, or be of Counsel directly or indirectly with either of the parties in Suit, or in the execution of their Office shall do ought else maliciously, or fraudulently, whereby the said Ecclesiastical Judge or his Proceedings may be slandered or defamed: We Will and Ordain, That the said Register or his Deputy or Substitute, offending in all, or any of the Premises, shall by the Bishop of the Diocese be Suspended from the Exercise of his Office for the space of one, two or three Months, or more, according to the Quality of his Offence, and that the said Bishop shall assign some other publick Notary to execute and discharge all things pertaining to his Office, during the time of his said Suspension.

135. *A certain Rate of Fees due to all Ecclesiastical Officers.*

No Bishop, Suffragan, Chancellor, Commissary, Archdeacon, Official, nor any other exercising Ecclesiastical Jurisdiction whatsoever, nor any Register of any Ecclesiastical Courts, nor any Minister belonging to any of the said Officers or Courts, shall hereafter, for any Cause incident to their several Offices, take or receive any other or greater Fees, than such as were certified to the most Reverend Father in God, John, late Archbishop of Canterbury, in the Year of our Lord God, One thousand five hundred ninety and seven, and were by him Ratified and Approved, under pain that every such Judge, Officer or Minister offending herein shall be Suspended from the Exercise of their several Offices, for the space of six Months for every such Offence. Always provided, that if any Question shall arise concerning the certainty of the said Fees or any of them, then those Fees shall be held for lawful, which the Archbishop of Canterbury for the time being shall under his Hand approve, except the Statutes of this Realm before made, do in any Particular Case express some other Fees to be due. Provided furthermore, that no Fee or Money shall be received either by the Archbishop, or any Bishop or Suffragan, either directly or indirectly, for admitting of any into Sacred Orders, nor that any other person or persons under the said Archbishop, Bishop or Suffragan, shall for Parchment, Writing, Wax, Sealing, or any other respect thereunto appertaining, take above Ten shillings, under such pains as are already by Law prescribed.

136. *A Table of the Rates and Fees to be set up in Courts and Registries.*

We do likewise constitute and appoint, That the Registers belonging to every such Ecclesiastical Judge, shall place two Tables, containing the several Rates and Sums of all the said Fees: one in the usual Place or Consistory where the Court is kept, and the other in his Registry, and both of them in such sort, as every man, whom it concerneth, may without difficulty come to the View and Perusal thereof, and take a Copy of them; the same Tables to be so set up before the Feast of the Nativity next ensuing. And if any Register shall fail to place the said Tables according to the Tenor hereof, he shall be Suspended from the execution of his Office, until he cause the same to be accordingly done: And the said Tables being once set up, if he shall at any time remove or suffer the same to be removed, hidden or any way hindred from sight, contrary to the true meaning of this Constitution, he shall for every such Offence be Suspended from the Exercise of his Office for the space of Six Months.

137. *The whole Fees for shewing Letters of Orders, and other Licences, due but once in every Bishop's time.*

Forasmuch as a chief and principal Cause and Use of Visitation is, that the Bishop, Archdeacon or other assigned to Visit, may get some good

knowledge of the State, Sufficiency and Ability of the Clergy, and other persons whom they are to Visit: We think it convenient, that every Parson, Vicar, Curate, Schoolmaster, or other Person Licensed whosoever, do at the Bishop's first Visitation, or at the next Visitation after his Admission, shew and exhibit unto him his Letters of Orders, Institution and Induction, and all other his Dispensations, Licences or Faculties whatsoever, to be by the said Bishop either allowed, or (if there be just cause) disallowed and rejected: and being by him approved, to be, as the Custom is, signed by the Register; and that the whole Fees accustomed to be paid in the Visitations in respect of the Premises, be paid only once in the whole time of every Bishop, and afterwards, but half of the said accustomed Fees, in every other Visitation, during the said Bishop's Continuance.

Registers.

APPARITORS.

Apparitors.

138. *The number of Apparitors Restrained.*

Forasmuch as we are desirous to redress such Abuses and Aggrievances as are said to grow by Somners or Apparitors; we think it meet that the multitude of Apparitors be (as much as is possible) abridged or restrained: Wherefore we Decree and Ordain, That no Bishop or Archdeacon, or their Vicars or Officials, or other inferior Ordinaries, shall depute or have more Apparitors to serve in their Jurisdictions respectively, than either they or their Predecessors were accustomed to have Thirty years before the Publishing of these our present Constitutions. All which Apparitors shall by themselves faithfully execute their Offices, neither shall they, by any colour or pretence whatsoever, cause or suffer their Mandates to be executed by any Messengers or Substitutes, unless it be upon some good cause to be first known and approved by the Ordinary of the place. Moreover, they shall not take upon them the Office of Promoters or Informers for the Court, neither shall they exact more or greater Fees than are in these our Constitutions formerly prescribed. And if either the number of the Apparitors deputed, shall exceed the aforesaid Limitation, or any of the said Apparitors shall offend in any of the Premises, the persons deputing them, if they be Bishops, shall, upon Admonition of their Superior, discharge the Persons exceeding the number so limited: if inferiour Ordinaries, they shall be Suspended from the execution of their Office until they have dismissed the Apparitors by them so deputed, and the parties themselves so deputed shall for ever be removed from the Office of Apparitors: and if being so removed, they desist not from the Exercise of their said Offices, let them be punished by Ecclesiastical Censures as persons Contumacious. Provided, that if upon Experience the number of the said Apparitors be too great in any Diocese in the Judgment of the Archbishop of Canterbury for the time being, they shall by him be so abridged as he shall think meet and convenient.

AUTHORITY OF SYNODS.

Authority of Synods.

139. *A National Synod the Church Representative.*

Whosoever shall hereafter affirm, That the Sacred Synod of this Nation, in the Name of Christ, and by the King's Authority assembled, is not the true Church of England by Representation, let him be Excommunicated, and not restored until he repent and publicly revoke that his wicked Error.

140. *Synods conclude as well the absent as the present.*

Whosoever shall affirm, That no manner of Person, either of the Clergy or Laity, not being themselves particularly assembled in the said Sacred

Authority of
Synods.

Synod, are to be subject to the Decrees thereof in Causes Ecclesiastical (made and ratified by the King's Majesties supreme Authority) as not having given their Voices unto them: let him be Excommunicated, and not restored until he repent and publickly revoke that his wicked Error.

141. *Depravers of the Synod censured.*

Whosoever shall hereafter affirm, That the Sacred Synod, assembled as aforesaid, was a company of such persons as did conspire together against godly and religious Professors of the Gospel: and that therefore both they and their Proceedings in making of Canons and Constitutions in Causes Ecclesiastical by the King's Authority, as aforesaid, ought to be despised and contemned, the same being ratified, confirmed and enjoined by the said Regal Power, Supremacy and Authority: let them be Excommunicated, and not restored until they repent and publickly revoke that their wicked Error.

We (a) of Our Princely Inclination, and Royal Care for the Maintenance of the present Estate and Government of the Church of England, by the Laws of this Our Realm now Settled and Established, having diligently, with great Contentment and Comfort, read and considered of all these their said Canons, Orders, Ordinances, and Constitutions, agreed upon, as is before expressed; and finding the same such, as We are perswaded will be very profitable, not only to Our Clergy, but to the whole Church of this Our Kingdom, and to all the true Members of it (if they be well observed), Have therefore for Us, Our Heirs and Lawful Successors, of Our Especial Grace, certain Knowledge, and meer Motion, given, and by these Presents do give Our Royal Assent, according to the Form of the said Statute or Act of Parliament aforesaid, to all and every of the said Canons, Orders, Ordinances and Constitutions, and to all and every thing in them contained, as they are before written.

And furthermore, We do not only by Our said Prerogative Royal, and Supreme Authority in Causes Ecclesiastical, Ratifie, Confirm, and Establish, by these Our Letters Patents, the said Canons, Orders, Ordinances and Constitutions, and all and every thing in them contained, as is aforesaid; but do likewise Propound, Publish, and straightway Enjoyn and Command by Our said Authority, and by these our Letters Patents, the same to be diligently observed, executed, and equally kept by all Our Loving Subjects of this Our Kingdom, both within the Province of Canterbury and York, in all Points wherein they do or may concern every or any of them, according to this Our Will and Pleasure hereby signified and expressed: And that likewise for the better Observation of them, every Minister, by what Name or Title soever he be called, shall in the Parish Church or Chapel where he hath Charge, read all the said Canons, Orders, Ordinances and Constitutions once every year, upon some Sundays or Holydays in the afternoon before Divine Service, dividing the same to such sort, as that the one half may be Read one Day, and the other another Day: The Book of the said Canons to be provided at the Charge of the Parish betwixt this and the Feast of the Nativity of Our Lord God next ensuing: Straightly charging and commanding all Archbishops, Bishops, and all other that exercise any Ecclesiastical Jurisdiction within this Realm, every man in his place, to see, and procure (so much as in them lieth) all and every of the same Canons, Orders, Ordinances and Constitutions to be in all Points duly observed, not sparing to execute the Penalties in them severally mentioned, upon any that shall wittingly or wilfully break, or neglect to observe the same, as they tender the Honour of God, the Peace of the Church, the Tranquillity of the Kingdom, and their Duties and Service to Us their King and Sovereign. In Witness, &c.

(a) James I.

Constitutions and Canons Ecclesiastical

OF

THE CHURCH OF IRELAND.

CHARLES^(b) by the grace of God King of England, Scotland, France, and Ireland, Defender of the Faith &c. To all men to whom these presents shall come, greeting. Whereas our Bishops, Deans of our Cathedrall Churches, Arch-deacons, Chapters and Colledges, and the rest of the Clergie within our Kingdome of Ireland, were summoned and called by vertue of our Writts directed to the Arch-bishops of the foure severall Provinces, and bearing date the foure and twentieth day of May, in the tenth yeare of our Raigne, to appeare before the said Arch-bishops in the Cathedrall Church of S. Patricks Dublin upon the one and twentieth day of Iuly then next ensueing, then and there to treat and conclude upon certaine high and urgent affaires in the said Writts mentioned, who did thereupon at the time appointed, and in the said Cathedrall Church of S. Patricks aforesaid, assemble themselves and appeare in Convocation for that purpose, according to the tenor of the said Writts. And whereas wee for divers urgent and weighty occasions us thereunto moving, of our especiall grace, certaine knowledge, and meere motion, did by vertue of our prerogative royall and supream authority in causes Ecclesiasticall, give and grant by our Letters Patents under our great Seale of Ireland, bearing date the one and twentieth day of Iuly in the tenth yeare of our Raigne, full power and authority unto the said Arch-bishops, Bishops, Deanes, Arch-deacons, Chapters, Colledges and Clergie of this Kingdome then assembled in Convocation, in the said Cathedrall Church of S. Patrick, that they from time to time during the Parliament then begun at Dublin might conferre, treat, consult and conclude of and upon such Articles, Canons, Orders, Ordinances, Statutes and Constitutions Ecclesiasticall, as they shall thinke necessary, fit and convenient for the honour and service of Almighty God, and augmentation of his divine worship, the rooting out of heresies and errours out of the Vineyard of Christ, for procuring of the good and quiet of the Church and preservation of good government in causes Ecclesiasticall, and to the Iurisdiction of the Church belonging, as also to make and set downe ordinances and decrees to have such force and effect as other Canons and Constitutions of the Church have, and the same (our royall assent being thereunto first had and obtained) to set forth and publish freely and lawfully, and that aswell the Archbishops and Bishops, and all other inferiour persons whom it may concerne, should yeild due obedience thereunto, as in and by our said Letters Patents more at large it doth and may appeare. Forasmuch as the said Archbishops, Bishops, Deanes, Archdeacons, Chapters and Colledges with the rest of the Clergie of this Kingdome having met together at the time and place before mentioned, and then and there by vertue of our said authority granted unto them, have treated of, concluded and agreed upon certaine Canons, Orders, Ordinances, and Constitutions, to the end and purpose by VS limited and prescribed unto them, and have thereupon offered and presented the same unto VS, most humbly desiring VS to give our royall assent unto their said Canons, Orders, Ordinances and Constitutions, according to

Canons of the
Church of
Ireland.

the forme of a certaine Statute or Act of Parliament made in that behalfe, and by our said Prerogative royall, and supream authority in causes Ecclesiasticall, to ratifie by our Letters Patents under our great Seale of Ireland, and to confirme the said Canons being one hundred in number, and contained in a Booke intituled, *Constitutions and Canons Ecclesiasticall*, treated upon by the Archbishops and Bishops, and the rest of the Clergie of Ireland, and agreed upon with the Kings Majesties licence in their Synod begun at Dublin *Anno Domini* 1634, and in the year of the raigne of our Sovereigne Lord CHARLES by the grace of God of great Brittain, France, and Ireland the tenth, which Booke is remaining with *Iohn Forth* Clerke of the upper house of *Convocation*. WEE of our Princely inclination and royall care for the maintenance of the present estate and government of the Church of Ireland by the Lawes of this our Realme now settled and established, having diligently with great contentment and comfort read and considered of all these their said Canons, Orders, Ordinances and Constitutions agreed upon, as is before expressed, and finding the same such, as *Wee* are perswaded will be very profitable, not onely to our Clergie, but to the whole Church of this our Kingdome; and to all the true members of it, (if they be well observed.) HAVE therefore for VS our heirs and lawfull successors, of our especiall grace, certaine knowledge and meere motion, by the advise and consent of our right trusty and right welbeloved Cousin and Counsellour, *Thomas Viscount Wentworth* our Deputy generall of our said Kingdome of Ireland, and President of our Councell established in the North parts of our Kingdome of England, given and by these presents doe give our royall assent according to the forme of the said Statute or Act of Parliament aforesaid, to all and every the said Canons, Orders, Ordinances and Constitutions, and all and every thing in them contained. And furthermore, Wee doe not onely by our said Prerogative royall and supream authority in causes Ecclesiasticall, ratifie, confirme and establish by these our Letters Patents the said Canons, Orders, Ordinances and Constitutions, and all and every thing in them containd, as is aforesaid, but doe likewise propound, publish, and streightly enjoinne and commaund by our said authority, and by these our Letters Patents the same to bee diligently observed, executed, and equally kept by all our loving Subjects of this our Kingdome, in all points wherein they doe, or may concerne every or any of them; according to this our will and pleasure hereby signified and expressed. And that likewise for the better observation of them every Minister by what name or title soever hee be called, shall in the Parish Church or Chappell where he hath charge, reade all the Canons, Orders, Ordinances and Constitutions once every yeare, upon some Sundayes or Holydayes in the after-noon before divine service; dividing the same in such sort, as that the one halfe may be read one day, and the other another day. The Booke of the said Canons to be provided at the charge of the Parish betwixt this, and the Feast of Easter next ensuing. Streightly chargeing and commaunding all Archbishops, Bishops, and all other that exercise any Ecclesiasticall Iurisdiction within this Realme, every man in his place to see and procure (so much as in them lyeth) all and every of the same Canons, Orders, Ordinances and Constitutions to be in all points duly observed, not sparing to execute the penalties in them severally mentioned upon any that shall wittingly or wilfully breake or neglect to observe the same, as they tender the honor of God, the peace of the Church, tranquillitie of the Kingdome, and their dueties and service unto VS their King and Sovereigne. In witnes &c.

CONSTITUTIONS* AND CANONS ECCLESIASTICALL,
*Treated upon by the Archbishops, and Bishops, and the rest of the
 Clergie of IRELAND; and agreed upon by the Kings Majesties
 licence in their Synod begun and holden at Dublin, Anno Domini 1634,
 and in the yeare of the raigne of our Sovereigne Lord Charles by
 the grace of God King of Great Brittain, France, and Ireland
 the tenth.*

Canons of the
 Church of
 Ireland.

* See title
 Church in
 Ireland.

OF THE CHURCH OF IRELAND.

1. Of the agreement of the Church of England and Ireland in the profession of the same Christian Religion.
2. The Kings Supremacy in Causes Ecclesiasticall to be maintayned.
3. Of the prescript Forme of Divine Service contayned in the Booke of Common prayer.
4. Of the forme of Consecrating and ordering Archbishops, Bishops, &c. and of the Churches established according to that order.
5. Authors of schismes and maintayners of Conventicles censured.

OF DIVINE SERVICE, PREACHING OF THE
 WORD, AND ADMINISTRATION OF
 THE SACRAMENTS.

6. Due celebration of Sundayes and Holydaies.
7. The prescript forme of Divine service to be used on Sundayes and Holy-dayes, with all decency, and due reverence.
8. Of the ordering of certaine parts of the Service.
9. Beneficed Preachers being resident on their livings, to preach every Sunday,
10. No publique opposition betweene Preachers.
11. Ministers to Catechize every Sunday.
12. The people to be informed in the body of Christian Religion, and reformed in their conversation.
13. Preachers and Lecturers to reade Divine Service, and administer the Sacraments twice a yeare at the least.
14. Ministers not to refuse to Christen or Bury.
15. Ministers not to deferre Christening if the child be in danger.
16. Fathers not to be Godfathers in Baptisme, nor children not Communicants.
17. Confirmation, or laying hands upon children, to be performed by the Bishop once in three yeares.
18. Of the receiving of the holy Communion.
19. Warning to be given before hand for the Communion.

20. Notorious offenders not to be admitted to the Communion.
21. Ministers not to preach or administer the Communion in private houses.
22. Ministers not to hold private conventicles.

OF BISHOPS, ARCHDEACONS, DEANES, AND
 PREBENDARIES.

23. Of Ordering Ecclesiasticall Iurisdiction.
24. Of ordering the revenues of Ecclesiasticall persons.
25. Of Archdeacons.
26. Residence of Deanes in their Churches.
27. Deanes and Prebendaries to preach during their Residence.
28. Prebendaries to be resident upon their benefices.

OF THE ORDINATION, FUNCTION, AND
 CHARGE OF MINISTERS.

29. Foure solemne times appointed for the making of Ministers.
30. The titles of such as are to be made Ministers.
31. The qualitie of such as are to be made Ministers.
32. The examination of such as are to be made Ministers.
33. Caution for Institution of Ministers into Benefices.
34. Patrons of Ecclesiasticall Benefices.
35. Prevention of Symoniacall contracts in those that are presented by them.
36. Small Parishes to be united and Residence enjoyned.
37. Absence of Beneficed men, and livings appropriated to be supplied by Curats that are allowed Preachers.
38. None to be Curats but allowed by the Bishop.
39. Strangers not admitted to preach without Licence.
40. Ministers to conferre with Recusants.
41. Ministers to visite the sicke.
42. Sobernesse of conversation, and decencie of apparell required in Ministers.
43. Of consecration of Churches.
44. A Terrier of gleabe-lands and other possessions belonging to churches.
45. Payment of Tythes.
46. A Registry to bee kept of Christnings, Weddings, and Burials.

Canons of the
Church of
Ireland.

OF MARRIAGES AND DIVORCES.

47. None to marry within the degrees prohibited.
48. None to marry under XXI. yeares without their Parents consent.
49. Security to be taken at the granting of Licences to marry without publication of Bannes, and under what conditions.
50. Oathes to be taken for the conditions.
51. An exception for those that are in Widowhood.
52. Ministers not to marry any person without Bannes.
53. No sentence for Divorce to be given upon the sole confession of the Parties.
54. No sentence of Divorce to be given but in open court.
55. In all sentences for Divorce, bond to be taken for not marrying during each others life.

OF ECCLESIASTICALL COURTS, AND JURISDICTION.

56. The Order of Jurisdictions to be kept.
57. The restraint of double Quarrels upon the respite of Institution.
58. Inhibitions not to be granted without the subscription of an Advocate.
59. Inhibitions not to be granted untill the Appeale be exhibited to the Iudge.
60. Solemne denunciation of parties excommunicated.
61. Notorious crimes and scandals to be certified into Ecclesiasticall Courts by presentments.
62. Schismatics to be presented.
63. Not-communicants at Easter to be presented.
64. Ministers may present.
65. Ministers and Church-wardens not to be sued for presenting.
66. Church-wardens not bound to present oftner than twice a yeare.
67. Church-wardens not to be troubled for not presenting oftner than twice a yeare.
68. Convenient time to bee assigned for framing presentments.
69. None to be cited into Ecclesiasticall Courts by Proces of *Quorum nomina*.
70. Maturity required in proceeding.
71. No sentence of Deprivation or Deposition to be pronounced against a Minister but by the Bishop.
72. No Act to be sped but in open Court.
73. No Court to have more than one Seale.
74. Convenient Places to be chosen for keeping of Courts.
75. Peculiar and inferior Courts to ex-

hibit the originall Copies of Wills into the Bishops Registry.

76. The qualitie and Oath of Iudges and Surrogates.
77. Proctors not to retayne Causes without the lawfull assignement of the parties.
78. Proctors prohibited the Oath *in animam domini sui*.
79. Proctors not to be clamorous in Court.
80. The oath *de calumniâ* not to be refused.
81. Abuses to be reformed in Registers.
82. A certaine rate of Fees to all Ecclesiasticall Officers.
83. A table of the rates of Fees to be set up in Courts and Registries.
84. The whole Fees for showing Letters of orders, and other licences, due but once, in every Bishops time.
85. The number of Apparitors restrained.

OF PARISH CLEARKS, CHURCH-WARDENS, AND SCHOOLE-MASTERS, AND THEIR SEVERALL DUTIES.

86. Parish Clearks to be chosen by the Ministers.
87. The choyce of Church-wardens, and their Accompt.
88. The choyce of Side-men, and their joynt office with Church-wardens.
89. The old Church-wardens to make their Presentments before the new be sworne.
90. The duty of Church-wardens touching such persons as are out of the Church in time of Gods worship on Sundayes and Holy-dayes.
91. Their duty touching those persons that are in the Church at that time.
92. To keepe the Church from being prophaned at all other times.
93. To see Churches and Church-yards kept in sufficient reparation.
94. To furnish all Churches with things necessary for the celebration of Divine Service, Preaching and administration of the Sacraments.
95. To provide things fitting for every Communion, and to observe those that come, or come not to the same.
96. To provide a Chest for Almes in every Church.
97. To abolish all monuments of superstition.
98. None to teach Schoole without Licence, and Curates desirous to teach to be licensed before others.
99. The dutie of Schoolemasters.

OF THE AUTHORITIE OF THE SYNOD.

100. The authority of this Nationall Synod established.

1. *Of the agreement of the Church of England and Ireland, in the profession of the same Christian Religion.* Of the Church of Ireland.

For the manifestation of our agreement with the Church of England in the confession of the same Christian Faith, and the doctrine of the Sacraments : Wee doe receive and approve the Booke of Articles of Religion agreed upon by the Archbishops, and Bishops, and the whole Clergie in the Convocation holden at London in the yeare of our Lord God 1562, for the avoyding of diversities of opinions, and for the establishing of consent touching true Religion. And therefore if any hereafter shall affirme that any of those Articles are in any part superstitious or erroneous, or such as he may not with a good conscience subscribe unto, let him be excommunicated, and not absolved before he make a publique revocation of his errour.

2. *The Kings Supremacy in Causes Ecclesiasticall to be maintained.*

All Ecclesiasticall persons having cure of soules, and all other Preachers, and Readers of Divinitie Lectures, shall to the uttermost of their wit, knowledge and learning, purely and sincerely (without any colour or dissimulation) teach, manifest, open and declare, foure times every yeare (at the least) in their Sermons, and other Collations and Lectures ; That all usurped and forraine power, (forasmuch as the same hath no establishment nor ground by the Law of God,) is for most just causes taken away and abolished : and that therefore no manner of obedience or subjection, within his Majesties Realmes and Dominions, is due unto such forraine power : but that the Kings power within his Realme of Ireland, and all other his Dominions and Countreyes, is the highest power under God, to whom all men, aswell Inhabitants, as borne within the same, doe by Gods Lawes, owe all loyaltie and obedience, and to no other forraine power and potentate in the earth. And whosoever shall hereafter maintaine, that the Kings Majestie hath not the same authority in causes Ecclesiasticall, that the godly Kings had amongst the Iewes, and Christian Emperours in the Primitive Church, or impeach in any part his Regall supremacy in the said causes restored to the Crowne, and by the Lawes of this Realme therein established, let him be excommunicated, and not restored, but onely by the Archbishop of the Province, after his repentance, and publique revocation of his errour.

3. *Of the prescript Forme of Divine Service, contained in the Booke of Common Prayer.*

That forme of Liturgie or Divine Service, and no other, shalbe used in any Church of this Realme, but that which is established by the Law, and comprised in the Booke of Common Prayer, and administration of Sacraments. And if any one shall preach, or by other open words declare or speake any thing in the derogation or despising of the said Booke, or of any thing therein contained, let him be excommunicated, and not restored, untill he repent, and publiquely revoke his errour.

4. *Of the forme of consecrating and ordering Archbishops, Bishops, &c. and of the Churches established according to that order.*

That forme of Ordination, and no other, shalbe used in this Church, but that which is contained in the booke of ordering Bishops, Priests, and Deacons, allowed by authority, and hitherto practised in the Churches of England and Ireland. And if any shall affirme, that they who are consecrated, or ordered, according to those rites, are not lawfully made, nor ought to be accounted either Bishops, Priests, or Deacons ; or shall deny that the Churches, established under this government, are true Churches ; or refuse to joyne with them in Christian profession, let him be excommunicated, and not restored untill hee repent and publiquely revoke his errour.

Of the Church
of Ireland.

5. *Authors of Schisme, and maintainers of Conventicles censured.*

Whosoever shall separate themselves from the Communion of Saints, as it is approved by the Apostles rules in the Church of Ireland, and combine themselves together in a new brotherhood; (accounting the Christians who are conformable to the doctrine, government, rites and ceremonies of the Church of Ireland, to be prophane and unmeet for them to joyne with in Christian profession) or shall affirme and maintaine, that there are within this Realme other meetings, assemblyes, or congregations, then such as by the Lawes of this Land are held and allowed, which may rightly challenge to themselves the name of true and lawfull Churches, let him be excommunicated, and not restored, untill he repent and publiquely revoke his errour.

Of Divine
Service,
Preaching of
the Word, and
Administra-
tion of the
Sacraments.

6. *Due celebration of Sundayes and Holy-dayes.*

All manner of persons shall celebrate and keepe the Lords day. [The same as Canon 13 of the English Church.]

7. *The prescript forme of Divine Service to be used on Sundayes and Holydayes, with all decencie and due reverence.*

Every Sunday and Holy-day, the Parsons, Vicars, and Curates, shall celebrate Divine Service, at convenient and usuall times of the day, and in such place of every Church, as the Bishop of the Diocesse, or Ecclesiasticall Ordinary of the place, shall thinke meet, for the largenesse or straitnesse of the same, so as the people may be most edified. All Ministers likewise shall use and observe the Orders, Rites, Ornaments, and Ceremonies prescribed in the Booke of Common Prayer and in the Act for uniformity printed therewith, as well in reading the holy Scriptures, and saying of prayers, as in administration of the Sacraments; without either diminishing in regard of preaching, or in any other respect, or adding any thing in the matter or forme thereof. And in Cathedrall, and Collegiate Churches, all Deanes, Masters, and Heads of Collegiate Churches, Canons and Prebendaries, being Graduates, shall daylie at the times both of prayer and preaching, weare with their Surplises, such Hoods as are agreeable to their degrees. No man also shall cover his head in any Church or Chappell in the time of Divine Service, except he have some infirmity, in which case he may weare a night-cap or coife. Neither shall any person be otherwise at such times busied, then in quiet attendance to heare, marke, and understand that which is read, preached, or ministred: using all such reverent gestures and actions, as by the Booke of Common Prayer are prescribed in that bebalfe, and the commendable use of this Church received, and not departing out of the Church, during the time of Service and Sermon, without some urgent or reasonable cause.

8. *Of the ordering of certaine parts of the Service.*

Also the Minister reading the Lessons, Epistle and Gospell, and the Ten commandements, and such other parts of Divine Service, as doe greatly tend to the edifying of the people, shall so place himselfe, and so turne him to the people, as they may best hearken thereunto, and be edified by the same. And every Beneficiary and Curate shall endeavor, that the confession of sinnes and absolution, and all the second service, (at or before the communion, to the Homily or Sermon), where the people all, or most, are Irish, shalbe used in English first, and after in Irish, if the Ordinary of the place shall so thinke meete.

9. *Beneficed Preachers being resident upon their Livings, to preach every Sunday.*

Every beneficed man, allowed to bee a Preacher, and residing on his Benefice, having no lawfull impediment, shall in his owne cure, preach one Sermon every Sunday of the yeare: And therein hee shall teach no vaine opinions, no Heresies, nor Popish errors, disagreeing from the Articles of Religion, generally received in the Churches of England and Ireland; nor any thing

at all, whereby the people may be stirred up to the desire of novelties or contention: but shall soberly and sincerely divide the Word of truth, to the glory of God, and to the best edification of the people.

Of Divine Service, Preaching of the Word, and Administration of the Sacraments.

10. *No publique opposition betweene Preachers.*

[Same as Canon 53 of the English Church, save that "disquieting to" is used for "disquietness unto."]

11. *Ministers to catechize every Sunday.*

[Same as Canon 59 of the English Church, with the following addition:] Neither shall the Minister admit any to be married, or to be God-fathers or God-mothers, at the Baptisme of any childe, or to receive the holy Communion, before they can say the Articles of the beliefe, the Lords prayer, and the Commandements, in such a language as they understand.

12. *The people to be informed in the body of Christian Religion, and reformed in their conversation.*

For the better grounding of the People in the Principles of the Christian Religion, Wee ordaine, that the heads of the Catechisme, being divided into so many parts as there are Sundayes in the yeare, shalbe explained to the people in every Parish Church. In the handling whereof, the Ministers and Curates are to use such moderation, that they doe not runne into curious questions, or unnecessary controversies, but shortly declare, and confirme the doctrine proposed, and make application thereof to the behoofe of the hearers. The Ministers also in all their preaching, and catechizings, and private conferences, when neede requireth, shall teach the people to place their whole trust and confidence in God, and not in Creatures, neither in the Habite or Scapular of any Fryer, or in hallowed Beads, Medals, Reliques, or such like trumperyes. They shall doe their endeavour likewise to roote out all ungodly, superstitious, and barbarous customes; as using of charmes, sorcery, inchantments, witchcraft, or soothsaying; and generally to reforme the manners of the people committed to their charge, unto a Christian, sober, and civill conversation.

13. *Preachers and Lecturers to reade Divine Service, and administer the Sacraments twice a yeare at the least.*

[Same as Canon 56 of the English Church, save that after the words "prescribed by the booke of Common prayer," is added, "and the Act for uniformity printed therewith."]

14. *Ministers not to refuse to Christen, or Bury.*

[Same as Canon 68 of the English Church.]

15. *Ministers not to deferre christening, if the Childe be in danger.*

[Same as Canon 69 of the English Church, save that "such default" is printed instead of "such his default."]

16. *Fathers not to be Godfathers in Baptisme, nor Children not communicants.*

[Same as Canon 29 of the English Church.]

17. *Confirmation, or laying hands upon Children, to be performed by the Bishop, once in three yeares.*

Every Minister that hath cure and charge of Soules, for the better accomplishing the Orders prescribed in the booke of Common Prayer, concerning Confirmation, shall take such speciall care, as that none may be presented to the Bishop, for him to lay his hand upon, but such as can render an account of their faith, according to the Catechisme in the said booke contained. The Bishop also in his owne person, every third yeare (at least) in the time of his Visitation, shall performe that duty of Confirmation; or if in that yeare, by reason of some infirmity, he be not able personally to visit his Diocesse, he

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shall not omit to doe it the next yeare after, as he may conveniently. And whensoever the time shall by him be assigned, every such Minister shall use his best endeavour to prepare and make able, and likewise to procure as many as he can, to be then brought to be confirmed.

18. *Of the receiving of the holy Communion.*

In every Cathedrall and Collegiate Church, at least once every moneth, and in every Parish Church and Chappell, where Sacraments are to be administred within this Realme, the holy Communion shall be ministred by the Parson, Vicar, or Minister, so often, and at such times as every Parishioner may communicate at the least thrice in the yeare, (whereof the feast of Easter to be one) according as they are appointed by the booke of Common prayer. And that no Minister when he celebrateth the Communion, shall wittingly administer the same to any but such as kneele: Provided that every Minister as often as he administred the Communion, shall first receive the Sacrament himselfe. Furthermore, no bread, nor wine newly brought shalbe used, but first the words of Institution shall be rehearsed, when the said bread and wine be presented upon the Communion Table. Likewise the Minister shall deliver both the bread and wine to every communicant, severally.

19. *Warning to be given before hand for the Communion.*

Whereas every Lay person is bound to receive the holy Communion thrice every yeare, and many notwithstanding doe not receive that Sacrament once in a yeare. Wee doe require every Minister to give warning to his Parishioners, publiquely in the Church, at Morning Prayer the Sunday before every time of his administering the holy Sacrament, for the better preparation of themselves. Which said warning, wee enjoyne the said Parishioners to accept and obey under the penalty and danger of the Law. And the Minister of every Parish, and in Cathedrall and Collegiate Churches, some principall Minister of the Church, shall the afternoone, before the said administration, give warning by tolling of the Bell, or otherwise, to the intent, that if any have any scruple of conscience, or desire the speciall ministry of reconciliation, he may afford it to those who neede it. And to this end, the people are often to be exhorted, to enter into a speciall examination of the state of their owne soules: and that finding themselves either extreame dull, or much troubled in minde, they doe resort unto Gods Ministers, to receive from them aswell advise and counsell for the quickning of their dead hearts, and the subduing of those corruptions, whereunto they have beene subject, as the benefit of absolution likewise, for the quieting of their consciences, by the power of the Keyes, which Christ hath committed to his Ministers for that purpose.

20. *Notorious offenders not to be admitted to the Communion.*

[Same as Canon 26 of the English Church.]

21. *Ministers not to preach, or administer the Communion in private houses.*

[Same as Canon 71 of the English Church, save that "paine" is used for "pains."]

22. *Ministers not to hold private Conventicles.*

[Same as Canon 73 of the English Church, save that Church "in Ireland" is used for "in England," and that "*ipso facto*" is omitted after "excommunication."]

23. *Of ordering Ecclesiasticall Iurisdiction.*

Of Bishops,
Archdeacons,
Deans, and
Prebendaries.

No Archbishop, Bishop, or other person whatsoever, having Ecclesiasticall Iurisdiction, shall appoint, constitute, make and confirme any Chancellour, Commissary, or Officiall for longer time then their owne incumbency, except he be of the full age of twenty sixe yeares at least, and one that is learned in the Civill and Ecclesiasticall lawes, and is at the least a Master of Arts, or Bachelour of law, and is reasonably well practised in the course thereof.

Neither shall they let their Iurisdctions to farme, or grant, or confirme to any man, the next, second, or third advowson of any Prebend or Benefice, being in their gift. And if they shall make or confirme any such grant or Patent of the place of Chancellour, Commissary, or Officiall, for longer terme, then during their Incumbency, to any that is not qualified, as is hereby required, then the said person so accepting the said Patent or Grant, is to be held and declared incapable thereof, to all intents whatsoever. Lastly, the said Archbishops and Bishops, shall provide, that the Clergie and people be not burthened with unjust exactions by their servants and Officers in their Visitations: And that neither the Archbishops therein, shall charge their Suffragans, nor the Bishops their Clergie, with any Noctials, or Refections, over and above their ordinary procurations, (reserving notwithstanding unto the Archbishops in their Visitations, the Refections usually heretofore received in those Diocesses, where the same procurations are not received by them, which are yearely payde by the Clergie unto their Bishops.) And that no Archbishop, or Bishop, shall demaund from the Executors or Administrators of any of their Clergie, any Heriots or mortuaries, as in some places of this Kingdome heretofore hath been accustomed.

Of Bishops,
Archdeacons,
Deans, and
Prebendaries.

24. *Of ordering the revenues of Ecclesiasticall persons.*

No Archbishop, Bishop, Deane and Chapter, or Dignitary, shall in any wise diminish the auncient revenues of their Sees, or Churches, nor alienate their Lands in fee farme, nor destroy their woods, nor give power to their Tennants to make waste thereof, nor by any devise, demise their Mensall or demeasne Lands, unless it be to their Curates, actually dischargeing the said Cure, without forty dayes absence in any one yeare, and to them for no longer time or terme, then during their owne Incumbency. Neither shall they joyne with any Dignitary, Prebend, or other Beneficiarie or Beneficiaries, to confirme the Leases or alienations, made or to be made, by him or them, of any Ecclesiasticall profits or obventions. And the said Archbishops, and Bishops, shall carefully provide, that all Churches, Chancels, and Manse-houses, the repaire whereof properly belongeth to them, or any of them; or to any other Ecclesiasticall person or persons, be from time to time preserved from ruine and decay.

25. *Of Archdeacons.*

Every Archdeacon which hath authority to visit, either by common right, or by prescription, shall visit the precinct of his Iurisdiction, once every yeare, in his owne person, and he shall not substitute any to bee his Officiall, but such a one as hath beene brought up in the Vniversitie, and hath studied the Civill Law (if such a one may be had) being able not onely in learning, but also with gravity and modesty to discharge that Office.

26. *Residence of Deanes in their Churches.*

[Same as Canon 42 of the English Church, save that after the words "every yeare at least," is added "so that they have houses, or ground to build houses upon, belonging to their Churches."]

27. *Deanes and Prebendaries to preach during their residence.*

[Same as Canon 43 of the English Church.]

28. *Prebendaries to be resident upon their Benefices.*

[Same as Canon 44 of the English Church.]

29. *Foure solemne times appointed for the making of Ministers.*

[Same as Canon 31 of the English Church, save that "Ireland" is substituted for "England," and that there is added to the end of the Canon, "And lastly, that no person of what qualitie or gifts soever, be made a Deacon and Presbyter both together upon the same day."]

Of the Or-
dination,
Function
and Charge
of Ministers.

Of the Or-
dination,
Function
and Charge
of Ministers.

30. *The Titles of such as are to be made Ministers.*

[Same as Canon 33 of the English Church, save that the beginning of the English Canon "It hath been," &c. to "henceforth," is omitted; and that after "execute his ministry," is printed "or that he is a Senior Fellow of some Colledge in the Vniversitie, or except he be a Master of Arts," &c. &c.; and that after "Curateship then voyde," is added "not to be removed untill he be otherwise provided for."]

31. *The quality of such as are to be made Ministers.*

No Bishop shall hereafter admit any person into sacred Orders, which is not of his owne Diocesse, except he be a graduate of some Vniversitie within the Kings Dominions, or except he shall bring letters dimissory (so termed) from the Bishop of whose Diocesse he is; and desiring to be a Deacon, is three and twentie yeares olde, and to be a Presbyter foure and twentie yeares compleate: and hath taken some degree of Schoole in some of the said Vniuersities, or at the least, except he be able to yeild an account of his faith in Latine, (according to the Articles of Religion, generally received in the Church of England and Ireland,) and to confirme the same by sufficient testimonies out of the holy Scriptures. And except moreover hee shall then exhibit letters Testimoniall, or Authentick Certificate of his good life and conversation, under the Seale of some Colledge where before he remained, or of three or four grave Ministers together, with the subscription and testimony of other credible persons, who have knowne his life and behaviour, by the space of three years next before.

[Compare this with Canon 34 of the English Church.]

32. *The examination of such as are to be made Ministers.*

[Same as Canon 35 of the English Church, save that to the end of the Canon is added "Neither shall any person be received into the Ministry, nor admitted to any Ecclesiasticall Living, nor permitted to preach, reade Lecture, catechize, or Minister the Sacraments; except he shall first by subscription declare his consent to the first foure Canons of this present Synod, and every thing contayned therein."]

33. *Caution for institution of Ministers into Benefices.*

[Same as Canon 39 of the English Church.]

34. *Patrons of Ecclesiasticall Benefices.*

The Bishop shall earnestly and diligently exhort Patrons of benefices to consider the necessities of the Churches, and to have before their eyes the last day of judgment, and the Tribunall seat of God: Therefore that they preferre no man to any Ecclesiasticall living, but him which by doctrine, judgement, godlinesse, honesty and innocency of life, is able to beare so heavy a burthen, that they doe nothing therein, but uprightly, uncorruptly, and truely: But if any Patron shalbe convicted to have made any Symoniacall contract either directly or indirectly, let him be excommunicated *ipso facto*, not to be absolved but after publicke penance in the Cathedrall Church, and the Church so Symoniacally presented unto.

35. *Prevention of Symoniacall contracts in those that are presented by them.*

[Same as Canon 40 of the English Church, save that the title is different, and that after "Jesus Christ," is added "And for the better repressing of this cursed abuse, We ordaine and appoint that if any Clerke, or any other with his consent shall Seale any bond or bill to any person or persons, with condition of resignation of his benefice, whereto he is to be, or hath bin presented, or shall make or Covenant to make any Lease of the profits of the said benefice, or any part thereof unto the Patron or any belonging to him or any other person to his or their use, to continue during his Incumbencie, or for above

three yeares, or with notable diminution of the rent under the true value, he shalbe holden for convict of Symony, and proceeded against according to the severitie of the auncient Canons in that behalfe."']

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dination,
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and Charge
of Ministers.

36. *Small Parishes to be united, and Residence enjoyned.*

For remedy of the smallnesse of the maintenance of the Clergie, We ordaine that when there is in one Parish a Rectory and Vicarage, or portion of Tythes collative, The Bishop shall unite them perpetually : And those unions the Deanes and Chapters shalbe bound to confirme to remaine perpetually as one entire benefice, And that no dispensations be graunted to hold more than one benefice of greater value than forty pounds English per annum : but to such onely as shalbe very well able and sufficient to discharge his duty, having taken the degree of a Master of Art at least, in some Vniversitie within his Majesties Dominions, and being a publicke and sufficient Preacher licenced. Provided that he who is qualified as aforesaid, shall alwayes reside in one of his benefices, and some reasonable time of every yeare in each of them. And lastly, that he have under him, where hee doth not reside a Curate able to Catechize, and instruct the people, to have such maintenance as to the Ordinary shall seeme fit.

37. *Absence of beneficed men, and livings appropriated to be supplied by Curates that are allowed Preachers.*

Every beneficed man licenced by the Lawes of this Realme, (upon urgent occasions of other service), not to reside upon his benefice, shall cause his Cure to bee supplied by a Curate that is a sufficient, and licenced Preacher, if the worth of the benefice will beare it. But whosoever hath two benefices, shall maintain a Preacher licenced, in the benefice where hee doth not reside, except he preach himselfe at both of them usually. Also every beneficed man not allowed to bee a Preacher, shall procure Sermons to be preached in his Cure once every Moneth at the least, by Preachers lawfully licenced, if his living in the judgement of the Ordinary will be able to beare it. And upon every Sunday, when there shall not be a Sermon preached in his Cure, he or his Curate shall reade one of the Homilies prescribed by Authority, to the intents aforesaid. And as for those Churches where all the Tythes both great and small are taken by the Appropriator, Wee ordaine that the Bishop of the Diocesse according to the Lawes of the Church shall allot out of the said appropriation, such maintenance to a sufficient Curate, as in equitie in his discretion shall seeme meete and competent.

[Compare with Canon 47 of the English Church.]

38. *None to be Curates but allowed by the Bishop.*

No Curate or Minister shalbe permitted to serve in any place without examination, and tryall first to be made of his sufficiency, sobriety and fitnessse every way for the ministration, whereunto hee is to be deputed. Having respect to the greatnesse of the Cure, and meetenesse of the party. And being found worthy, he shalbe admitted by the Bishop of the Diocesse in writing under his hand and Seale. And the said Curates and Ministers, if they remove from one Diocesse to another, shall not be by any meanes admitted to serve, without testimony of the Bishop of the Diocesse or Ordinary of the place as aforesaid, whence they came, in writing of their honesty, abilitie and conformitie to the Ecclesiasticall Lawes of the Church of Ireland. Nor any shall serve more than two Churches or Chappels in one day, and those to be in a convenient distance, and unlesse the said Church or Chappell where such a Minister shall serve in two places, be not able in the judgement of the Bishop, or Ordinary, as aforesaid, to maintayne a Curate. Provided that no Clergy man holding any benefice in title shall by this Constitution be debarred from nominating an able Curate to such benefice, so often as the said Cure shalbe voyde, to be examined and admitted by the Bishop as aforesaid.

[Compare with Canon 48 of the English Church.]

39. *Strangers not admitted to preach without licence.*

Neither the Minister, Churchwardens, or other Officers of any parochiall or Collegiate Church, shall suffer any stranger to preach unto the people in their Churches except they know him to be sufficiently authorised thereto, as is aforesaid. And if any in his Sermon shall publish any Doctrine, eyther strange, or disagreeing from the Word of God, or from the Articles of Religion generally received in the Churches of England and Ireland, they shall by their Letters subscribed with some of their hands that heard him, so soone as may be, give notice of the same to the Bishop of the Diocesse, that hee may determine the matter, and take such order therein as he shall thinke convenient.

40. *Ministers to conferre with Recusants.*

[Same as Canon 66 of the English Church.]

41. *Ministers to visit the sicke.*

[Same as Canon 67 of the English Church, save that after "in any parish" is inserted "(although they have not formerly resorted to the Church.)"]

42. *Sobernesse of conversation, and decencie of apparell required in Ministers.*

No Ecclesiasticall person shall at any time other than for their honest necessities, so much as resort to any Taverns or Alehouses, neyther shall they board or lodge, in any such places. Furthermore they shall not give themselves to any base or servile labour, or to drinking or ryot, spending their time idly by day or by night, nor shall they give themselves to playing at Dice, Cardes, or Tables, or any other game unbeseeming their function; but at all times convenient they shall heare or reade somewhat of the holy Scriptures, or shall occupy themselves with some other honest study or exercise, alwayes doing the things which shall appertayne to honesty, and endeavoring to profit the Church of God, having alwaies in minde that they ought to excell others in purity of life, and should be examples to the people to live well and Christianly, under paine of Ecclesiasticall censures to be inflicted with severitie according to the qualities of their offences. Wee doe likewise constitute and appoint, that Archbishops and Bishops shall not intermit to use the accustomed apparell of their degrees. Likewise all Deanes, Masters of Colledges, Archdeacons, and Prebendaries in Cathedrall and Collegiate Churches, (being Priests or Deacons), Doctors in Divinitie, Law, and Physicke, Bachellors in Divinitie, Masters of Artes, and Bachellors of Law having any Ecclesiasticall living, shall usually weare Gownes with standing-Collars, and Sleeves streight at the hands; or wyde sleeves, as is used in the Vniversities, with Hoods, or Tippetts of silke or sarcenet, and square Caps in places and times convenient. And that all other Ministers, admitted or to be admitted into that function, shall also usually weare the like apparell as is aforesaid, except Tippetts onely. We doe further in like manner ordayne, That all the said Ecclesiasticall persons above mentioned shall usually weare in their journeyes, Cloakes with sleeves, commonly called Priests-cloakes, without gards, welts, long buttons, or cuts. And no Ecclesiasticall persons shall weare any Coyfe, or wrought Night-cap, but onely plain Night-caps of blacke Silke, Sattin, or Velvet. In all which particulars concerning the Apparell here prescribed, our meaning is not to attribute any holinesse, or speciall worthinesse to the said Garments, but for decencie, gravitie and order. In private houses, and in their studies, the said persons Ecclesiasticall may use any comely and Schollerlike Apparell. Provided that it be not cut or pinkt, and that in publike they goe not in their Dublet and Hose without Coats, or Cassocks: And also that they weare not any light coloured Stockins.

[Compare with Canons 74 and 75 of the English Church.]

43. *Of consecration of Churches.*

As often as Churches are newly built, where formerly there were not, or Church yards appointed for buriall, they shalbe Dedicated and Consecrated.

Provided that the ancient Churches and Church-yards, shall not be put to any base and unworthy use.

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dination,
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and Charge
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44. *A Terrier of Gleabe-lands, and other possessions belonging to Churches.*

[Same as Canon 87 of the English Church, as far as "whereof the Minister to be one," then is added "and be layd up in their severall Registries to the use of posteritie. And the Archbishops and Bishops shall in their Visitations carefully provide, that this Canon be observed, and that the said Terrier be renewed every ten yeares. And no Minister shall make any Lease of his Gleabe lands, or of his benefice, or the profits or meanes therof, above the terme of three yeares at the uttermost, saving unto all Patentees from his Majesty such power as is, or hereafter shalbe granted to them in their Patents, to demise their Gleabe or any part thereof."]

45. *Payment of Tythes.*

Forasmuch as every man is bound to pay his Tythes, no man shall by colour of dutie omitted by their Curats, detayne their Tythes, and so requite one wrong with another, or be his owne Iudge; but shall truely pay the same as hath beene accustomed, to their Parsons, Vicars and Curats, without any restraynt or diminution. And for such lacke and default, as they can justly find, in their Parsons, Vicars and Curats, they shall seeke for reformation to their Ordinaries, and other Superiors; who upon complaint and due prooffe thereof, shall reforme the same accordingly.

46. *A Registry to be kept of Christnings, Weddings, and Burials.*

[Same as Canon 70 of the English Church, save that instead of "since the time that the law was made in that behalf" &c. to "late Queen," is substituted "from the time that this Canon shall be established."]

47. *None to Marry within the degrees prohibited.*

[Same as Canon 99 of the English Church.]

Of Marriages
and Divorces.

48. *None to Marry under XXI. yeares without their Parents consent.*

[Same as Canon 100 of the English Church.]

49. *Securitie to be taken at the granting of Licences to marry without publication of Bannes, and under what conditions.*

[Same as Canon 102 of the English Church, save that at the end is added "Neyther in the time of Lent, nor of any publike fast, nor of the solemne festivities of the Nativity, Resurrection, and Ascension of our Lord, or of the Descension of the holy Ghost."]

50. *Oathes to bee taken for the Conditions.*

[Same as Canon 103 of the English Church.]

51. *An exception for those that are in Widdowhood.*

[Same as Canon 104 of the English Church, save that instead of "Commissary for Faculties, Vicars Generals or other the said Ordinaries," is printed "any having power to grant licence."]

52. *Ministers not to marry any person without Bannes.*

No Minister of what place soever, nor under colour of any peculiar libertie or priviledge, claymed to appertayne to any Church or Chappell, shall upon paine of deprivation, if he be beneficed, or degradation, if he bee not beneficed, celebrate Matrimony between any persons, without a facultie or licence granted, except the bannes of Matrimony have been first published three severall Sundayes or holy dayes, in the time of Divine Service, in the parish Churches and Chappels, wherein the said parties have dwelled, by the space of three Moneths before. Neither shall any Minister upon the like paine, under any pretence whatsoever, joyne any persons in maryage at any unseasonable times, but

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onely between the houres of eight and twelve in the forenoone, nor in any private place; but eyther in the said Churches or Chappels, where one of them dwelleth, and likewise in time of Divine Service, nor when bannes are thrice asked before the parties and Governors of the parties to be maryed being under the age of 21. yeares, shall eyther personally or by sufficient testimonie, signifie to him their consents given to the said maryage.

[Compare with Canons 62 and 63 of the English Church.]

53. *No sentence for Divorce to be given upon the sole confession of the parties.*

[Same as Canon 105 of the English Church.]

54. *No sentence of Divorce to be given but in open Court.*

[Same as Canon 106 of the English Church.]

55. *In all sentences for Divorce bond to be taken for not marrying during each others life.*

[Same as Canon 107 of the English Church.]

Of Ecclesiastical Courts
and Jurisdiction,

56. *The order of Iurisdications to be kept.*

For the avoyding of the unjust vexation of the people, and for the better preserving of order in the exercise of Ecclesiasticall Iurisdiction, Wee ordayne and appoint that the Probate of all Wills, and granting Administration of the goods of any Defunct, shalbe had before the Bishop of the Diocesse where he dwelled, unlesse it doe appeare, that the said Defunct had goods to the value of five pounds sterling in any other Diocesse: In which case, the said Probate, and granting Administrations, shalbe referred to the Prerogative Court. Provided, That if any die *in itinere*, the goods that he hath about him at that present, shal not cause his Testament, or the Administration to be lyable to the Prerogative Court. And the same order shalbe holden in Appeales, without passing by the intermediate Iurisdiction, upon paine of nullity in all Acts contrary to this Canon. And if any Iudge of the Prerogative Court, or any his Surrogate, or his Register, or Apparitor, shall cite, or cause to be cited, *Ex officio*, any man to the intents aforesaid, contrary to this Canon, not having knowledge, that the Probate of a Will, or granting Administration or Devolution of the cause, doe appertaine to his cognisance, he shall restore to the party so cited all his costs and charges, and the Acts and proceedings in that behalfe shall be held voyde and frustrate: which expences if the said Iudge, Register or Apparitor shall refuse accordingly to pay, he shalbe suspended from the exercise of his Office, until he yeild to the performance thereof.

[Compare with Canons 92 and 93 of the English Church.]

57. *The restraynt of Double Quarrels upon the respite of Institution.*

We doe ordayne and appoint, that no double Quarrels shalbe hereafter granted out of any the Archbishops, or prerogative Court, at the suite of any Clerke presented to any benefice, except he shall first take his personall Oath, that the space of two Moneths at the least is expired, since he first tendred his presentation to the Bishop, and that hee refused to grant him Institution thereupon, under pain of suspension of the granter thereof, from the execution of his Office for halfe a yeare, and nullity of the said double Quarrell, so unduly procured to all intents and purposes.

[Compare with Canon 95 of the English Church.]

58. *Inhibitions not to be granted, without the subscription of an Advocate.*

[Same as Canon 96 of the English Church.]

59. *Inhibitions not to be granted, untill the Appeale be exhibited to the Iudge.*

[Same as Canon 97 of the English Church, and see also Canon 98 of the English Church.]

60. *Solemne denunciation of parties Excommunicated.*

[Same as Canon 65 of the English Church, save that the Irish Canon ends at "refrayne their company and society."]

Of Ecclesiastical Courts and Jurisdiction.

61. *Notorious Crimes and scandals to be certified into Ecclesiasticall Courts by presentments.*

[Same as Canon 109 of the English Church.]

62. *Schismaticks to be presented.*

[Same as Canon 110 of the English Church.]

63. *Not Communicants at Easter to be presented.*

[Same as Canon 112 of the English Church.]

64. *Ministers may present.*

[Same as Canon 113 of the English Church.]

65. *Ministers, and Church-wardens not to be sued for presenting.*

[Same as Canon 115 of the English Church.]

66. *Church-wardens not bound to present oftner than twice a yeare.*

[Same as Canon 116 of the English Church.]

67. *Church-wardens not to be troubled, for not presenting oftner than twice a yeare.*

[Same as Canon 117 of the English Church.]

68. *Convenient time to be assigned for framing Presentments.*

[Same as Canon 119 of the English Church.]

69. *None to be cited into Ecclesiasticall Courts by Proces of Quorum nomina.*

No Bishop, Chancellor, Archdeacon, Officiall or other Ecclesiasticall Iudge, shall suffer any generall Proces of *Quorum nomina* to be sent out of his Court, except the names of all such as are thereby to be cited, shall be first expressly entred by the hand of the Register, or his deputy, under the said Processes; and the said processes and names be first subscribed by the Iudge or his deputy, and his Seale thereto affixed. And We further ordayne, that when any person appeareth upon citation whatsoever, that if the next Court day after, there be not Articles or a Libell put in against him, he shall then be dismissed with his costs.

[Compare with Canon 120 of the English Church.]

70. *Maturity required in proceeding.*

No man for neglect of apparance shalbe excommunicated for the first absence, but shalbe cited againe upon the same Proces. And if hee cannot be found, nor afterwards appeare upon *vijs & modis*, then to be decreed *Excommunicandum fore*. Yet for preventing such neglect, and that the party querelant may sustayne no detriment; hereby it is likewise ordered, that in causes of instance upon the apparance of any such person, he shall pay the charge past, before he be admitted to stand *Rectus in Curia*. And in the end of every Court, the names of those that are decreed, shalbe publikely read, to the intent that they may avoyde the danger of the fearefull sentence of Excommunication. Which course also, We ordayne, shalbe holden with those that be already denounced excommunicate, before the time of the signifying their obstinacie: to the end they and others may be admonished of the danger in which they stand, and to the aggravation of their obstinacie, if they continue in the same.

Of Ecclesiastical Courts and Jurisdiction.

71. *No sentence of deprivation or deposition to be pronounced against a Minister but by the Bishop.*

[Same as Canon 122 of the English Church, save that there is added "It is likewise ordered that no Chancellor, Commissary, Official, or any other person shall exercise any Ecclesiasticall Iurisdiction, over a Minister in causes criminall, except he himselfe have beene admitted into the holy Orders of Priesthood."]

72. *No Act to be sped but in open Court.*

[Same as Canon 123 of the English Church.]

73. *No Court to have more than one Seale.*

[Same as Canon 124 of the English Church.]

74. *Convenient places to be chosen for keeping of Courts.*

[Same as Canon 125 of the English Church.]

75. *Peculiar and inferior Courts to exhibite the Originall copies of Wills into the Bishops Registry.*

[Same as Canon 126 of the English Church.]

76. *The quality and Oath of Iudges and Surrogates.*

[Same as Canon 127 of the English Church, save that it has not the last words "and subscribe as aforesaid."]

77. *Proctors not to retayne causes without the lawfull assignement of the parties.*

[Same as Canon 129 of the English Church.]

78. *Proctors prohibited the Oath in animam domini sui.*

[Same as Canon 132 of the English Church.]

79. *Proctors not to be clamorous in Court.*

[Same as Canon 133 of the English Church.]

80. *The Oath de calumniâ not to be refused.*

We ordayne and appoint, that aswell the Actor, as his Proctor and Advocate (if they be required) shall take the Oath *De calumniâ*, wheresoever in the suit the same shall be tendred before sentence, upon paine that the cause shalbe dismissed by the Iudge, with costs for the party grieved.

81. *Abuses to be reformed in Registers.*

[Same as Canon 134 of the English Church.]

82. *A certaine rate of Fees to all Ecclesiasticall Officers.*

No Bishop, Suffragan, Chancellor, Commissary, Archdeacon, Official, or any other exercising Ecclesiasticall Iurisdiction whatsoever, nor any Register of any Ecclesiasticall Courts; nor any Minister belonging to any of the said Offices, or Courts, shall hereafter, (for any cause incident to their severall Offices,) take or receive any other or greater Fee, than such as are, or shalbe allowed by lawfull authoritie in this kingdome: under paine that every such Iudge, Officer, or Minister offending therein, shalbe suspended from the exercise of their severall Offices, for the space of sixe Moneths, for every such offence.

83. *A table of rates of Fees to be set up in Courts and Registries.*

[Same as Canon 136 of the English Church.]

84. *The whole Fees for shewing letters of orders, and other licences, due but once in every Bishops time.*

[Same as Canon 137 of the English Church.]

85. *The number of Apparitors restrayned.*

[Same as Canon 138 of the English Church.]

Of Ecclesiastical Courts and Jurisdiction.

86. *Parish Clerkes to be chosen by the Minister.*

No parish-Clerke, upon any vacation, shalbe chosen, but by the Parson or Vicar, or where there is no presentative, or collative Parson, or Vicar, by the Minister of that place for the time being: Which choyce shalbe signified by the said Minister, Vicar, or Parson, to the Bishop of the Diocesse, to be by him approved. And if the Parson, Vicar, or Curate, shall fayle to make choyce of such a man, and present him to the Bishop, to be by him allowed, by the space of forty dayes after the vacancy: in such case, the Bishop shall have power to nominate and appoint a Clerke for that place. And the said Clerke shalbe of twenty years of age at the least, and knowne to the said Parson, Vicar, or Minister, to be of honest conversation, and sufficient for his reading, writing, and also for his competent skill in singing, (if it may be.) And where the Minister is an English man, and many Irish in the parish, such a one, as shalbe able to reade those parts of the Service, which shalbe appointed to be read in Irish (if it may be:) and the Clerks so chosen shalbe resident; and performe their duties in their own persons. For which they shall receive their due wages without diminution at such times as have beene accustomed. And if any question doe arise, concerning the said custome or wages, the Bishop of the Diocesse shall set an order therein.

Of Parish Clerks, Churchwardens, Schoolmasters, and their several Duties.

[Compare with Canon 91 of the English Church.]

87. *The Choyce of Church-wardens and their Accompt.*

[Same as Canon 89 of the English Church, save that "Questmen" is omitted.]

88. *The choyce of Side-men, and their Joynt Office with Church-wardens.*

[Same as Canon 90 of the English Church, save that "Questmen" is omitted.]

89. *The old Church-wardens to make their Presentments, before the new be sworne.*

[Same as Canon 118 of the English Church.]

90. *The duty of Church-wardens touching such persons, as are out of the Church, in the time of Gods worship, on Sundayes or Holy-dayes.*

The Church-wardens and their assistants, shall warne Inholders, Taverners, Victuallers, and Alehouse-keepers, that they sell no meate, or drinke, and that they receive none into their Taverne, or Alehouse, all the time wherein there is preaching or celebration of Divine Service, upon Sundayes or Holy-dayes. If any doe contrary upon contempt, or stubbornnesse; they shall present both him and them, whom he received, by name, in the next Visitation. Also, they shall see, that none of those light wanderers in Markets, and pelting-sellers, which carry about, and sell, Pins, Poynts, and other small trifles, whom they call Pedlers, set out their Wares to sale: And that no Beggars, or idle persons abide, eyther in the Churchyarde, or neere the Church, all that time, but shall cause them eyther, to come in, or to depart.

[Compare with Canon 18 of the English Church.]

91. *Their duty touching those persons that are in the Church at that time.*

They shall also see, that in every meeting of the Congregation, peace be well kept; and that none behave themselves rudely, or disorderly in the Church. And to that end, they shall warne the people, that they bring not with them to the Church, Dogs, Hawkes with bels, or Children which are not so nurtured as they can be kept quiet in their seats, without running up and downe. Neyther shall they suffer any person to disturbe the Service or Sermon, eyther, by untimely ringing of Bels, or by walking, talking, laughing, or

any other noyse, which may hinder the Minister, or offend the people. And the names of all such as offend in this kinde, they shall truly, and personally present in the Ordinaryes visitations.

[Compare with Canon 19 of the English Church.]

92. *To keepe the Churches from being prophaned at all other times.*

They shall suffer no playes, feasts, banquets, suppers, Church-ales, drinkings, exposing any wares to sale, temporal Courts or Leets, Lay-juries, Musters, Commissions, (other than for causes Ecclesiasticall), playing at ball, or any other prophane usage to be kept in the Church, Chappell or Church-yard: Neyther the Bels to be rung, eyther in the feast of all Soules; or upon any Holydayes, or Eves, abrogated by the Booke of Common Prayer; neyther for Moneths or twelve-moneths mindes, or remembrances of the Dead, nor at any time at all prohibited by the Bishop.

[Compare with Canon 88 of the English Church.]

93. *To see Churches and Church-yards to be kept in sufficient reparations.*

[Same as Canon 85 of the English Church, save that "Questmen" is omitted.]

94. *To furnish all Churches, with things necessarie for the celebration of Divine Service, preaching, and administration of the Sacraments.*

They shall provide in every Church, at the common charge of the parish, two Books of Common prayer; one for the Minister, and the other for the Clerke, with all convenient speede; but at farthest, within sixe Moneths after the publishing of these Canons. And likewise the Bible of the last translation, set forth in the time of *King Iames*, of blessed memory. And where all, or the most part of the people, are Irish, they shall provide also the said Bookes in the Irish tongue; so soone as they may be had. The charge of these Irish books, being to be borne also, wholly by the parish. They shall also, at the same common charge, provide a fit seat for the Minister to read Service in, a comely and decent Pulpit, to be set in a convenient place for the preaching of Gods Word; a Font of stone set in the ancient usuall place, for the ministration of Baptisme; together with a fayre Table, to be placed at the East end of the Church or Chancell, and a Cup of Silver for the celebration of the *Holy Communion*. Which Table also shall stand covered in time of Divine Service with a Carpet of silke or other decent stuffe, thought meete by the Ordinary of the place, (if any question be made of it); and with a fayre linnen cloath, at the time of the ministration, as becommeth that Table.

[Compare with Canons 80, 81 and 82 of the English Church.]

95. *To provide things fitting for every Communion, and to observe those that come, or come not to the same.*

Likewise, they shall at the charge of the parish, against the time of every Communion, with the advise and direction of the Minister, provide a sufficient quantity of fine white Breade, and of good and wholesome Wine, for the number of Communicants, that shall from time to time receive there; which Wine they shall cause to be brought, to the Communion-table, in a cleane and sweete standing pott, or stoope of pewter, if not of purer mettall. Also they shall marke, aswell as the Minister, whether all and every of the parishioners, come so often every yeare, to the holy Communion, as the Lawes and our Constitutions doe require; and whether any strangers come often, and commonly, from other parishes to their Church: and shall shew their Minister of them, least perhaps they be admitted to the Lords Table, amongst others; which they shall forbid, and remit such home, to their owne parish Churches and Ministers, there to receive the Communion, with the rest of their owne neighbors.

[Compare with Canon 20 of the English Church.]

96. *To provide a Chest for Almes in every Church.*

[Same as Canon 84 of the English Church.]

97. *To abolish all Monuments of superstition.*

Moreover they shall, (with the approbation of the Ordinary of the place,) see, that all Rood-lofts, in which wooden Crosses stood: all shrines, and coverings of shrines, and all other Monuments of fayned miracles, pilgrimages, idolatry, and superstition, be cleane taken away and removed.

Churchwar-
dens and their
Duties.

98. *None to teach schoole without licence, and Curates desirous to teach, to be licenced before others.*

It shall not be lawfull for any to teach the Latine tongue, or to instruct Children eyther in Publike Schoole, or private house, but such as shalbe allowed by the Ordinary of the place, under his hand and Seale, being found meete, aswell for his learning and dexterity in teaching, as for sober and honest conversation; and also for right understanding of Gods true Religion, (saving to all Patrons and founders of Schooles the right of nomination). And in what parish soever, there is a Curat, which is a Master of Arts, or Bachellor of Arts, or is otherwise well able to teach youth, and will willingly so doe, for the better increase of his living, and trayning of Children in the principles of true Religion: We will, and ordayne, that the Licence to teach Grammar, shalbe granted to none by the Ordinary of that place, but onely to the said Minister or Schoolemaster. Provided alwayes, That this Constitution shall not extend to any parish, where there is a publike Schoole founded already. In which case, We thinke it not meete, to allow any to teache Grammar, but onely him that is allowed for the said publike Schoole.

[Compare with Canons 77 and 78 of the English Church.]

99. *The duty of Schoolemasters.*

All Schoolemasters, and Vshers, shall endeavour to trayne up the Children committed to their charge, in good learning, civility and piety. And in the Latine tongue, they shall teach the Grammar, set forth in England by king *Henry* the eight, and so continued ever since; and none other. They shall also teach such other Bookes, as shall be allowed and appointed by the Bishop of the Diocesse. Provided, that according to the priviledge granted to the Vniversity, neere *Dublin*, Logicke and Philosophy shall not be taught in Grammar schooles. Provided also, that none be admitted, or licenced to be a Schoolemaster, or Vsher within this kingdome, unlesse he first, by his subscription, testifie his consent to the two first Canons. And also, that every Archbishop, and Bishop, and other Ordinary (having Ecclesiasticall Iurisdiction) shall, by censures of the Church, respectively compell all such as are subject to their Iurisdiction, which doe now teach schoole, or hereafter shall presume to teach schoole, not having testified their consent by subscription as aforesaid, to desist from teaching of schoole.

[Compare with Canon 79 of the English Church.]

100. *The authority of this Nationall Synod established.*

This sacred Synod, being the representative body of the Church of Ireland, in the name of Christ, and by the Kings authority, lawfully assembled, doth pronounce and decree, that if any, within this Nation, shall despise and contemne the Constitutions thereof, (being by the said Regall power ratified and confirmed), or affirme, that none are to be subject thereunto, but such as were present, and gave their voyces unto them: he shall be Excommunicated, and not restored, untill hee shall publikely revoke his error.

Of the Autho-
rity of the
Synod.

[Compare with Canons 139, 140 and 141 of the English Church.]

Note.—These Canons are taken from a very scarce copy printed in 1635 at *Dublin*; for which, as well as for much valuable assistance during the progress of this edition through the press, the

Editor is indebted to Mr. James R. Hope, Fellow of Merton College, Oxford, and Chancellor of the Diocese of Salisbury.—ED.

Constitutions and Canons Ecclesiastical

OF

THE CHURCH IN SCOTLAND (a).

THE CODE OF CANONS OF THE EPISCOPAL CHURCH IN SCOTLAND, as Revised, Amended, and Enacted, by an Ecclesiastical Synod holden for that purpose at Edinburgh, on the 29th day of August, and continued by adjournment till the 6th of September inclusive, in the year of Our Lord 1838.

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| <ol style="list-style-type: none"> 1. For preserving the Episcopal Succession. 2. Regulating the Election and Office of the Primus. 3. For providing vacant Dioceses with duly elected Bishops, and regulating the Conduct of the Presbyters in such Dioceses. 4. For the Appointment of Coadjutor-Bishops. 5. Respecting the Jurisdiction of the Bishops in a Particular Case. 6. Enjoining the Studies and Qualifications of Candidates for Holy Orders. 7. Respecting the Age, the Prudence, the Place or Charge of Persons to be ordained; and in what Case Letters Dimissory are necessary. 8. Appointing the Solemn Performance of the Office of Ordination, and the Form to be used in Making, Ordaining, and Consecrating Bishops, Priests, and Deacons. 9. Requiring from Persons to be Ordained Subscription to the Thirty-Nine Articles of Religion, and certain Oaths to be taken by them. 10. Appointing the Conditions and Mode of Institution to a Pastoral Charge. 11. Requiring Presbyters to make Personal Residence in the Place where their Pastoral Charge lies, and not to be Absent but for a limited time. 12. Requiring Soberness of Conversation and Decency of Apparel in Ecclesiastical Persons, as well as a proper attention to the Good Order of their Families. | <ol style="list-style-type: none"> 13. Pointing out the Proper Clerical Studies. 14. Requiring the Clergy of this Church to continue in their Sacred Profession. 15. Concerning the Admission of Strangers to officiate in this Church. 16. The Names of Stranger Preachers to be Noted in a Book. 17. Respecting the due Administration of the Sacrament of Baptism. 18. Requiring a regular Course of Catechising in all Congregations. 19. Appointing Confirmation to be Administered in every Diocese once in Three Years, and the care to be taken that due preparation be made for that solemn Service. 20. Requiring due Intimation and Preparation to be made for the Holy Communion. 21. Respecting the Communion Service as the most Solemn Part of Christian Worship. 22. Respecting the Solemnization of Matrimony. 23. Respecting the Visitation of the Sick, and the Burial of the Dead. 24. Registers to be kept by every Clergyman, 25. Against exacting Money for Performance of Occasional Duties. 26. Enjoining a Reverent Observance of the Lord's Day. 27. Regulating the Times, and Public Assemblies for Divine Service, on other Days besides Sundays. 28. On the Uniformity to be observed in Public Worship. 29. Enjoining all due Reverence and |
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(a) See title *Church in Scotland*, for the statute 3 & 4 Vict. c. 38, enabling priests ordained by Scotch and American bishops to officiate in England under certain limitations.

- Attention in Time of Divine Service.
30. Respecting National Fasts and Thanksgivings.
 31. For appointing Diocesan Synods, and regulating the Business of the same.
 32. Appointing General Synods, and regulating the Business of the same.
 33. On the Legislative Power of General Synods.
 34. Appointing Episcopal Synods.
 35. Prescribing the Conditions of Appeal.
 36. Respecting Accusations against Bishops, Presbyters, and Deacons.
 37. Prohibiting the Clergy of one Diocese from interfering with the concerns of another.
 38. Providing for the Clergy and Laity of this Church being furnished with an accurate view of its State and Condition from time to time.
 39. Appointing the mode of admitting New Congregations into the Church.
 40. For Establishing and Maintaining a Society in Aid of the Church.
 41. Declaring what Censure or Spiritual Penalty is to be incurred by a Breach of these Canons.

FORMS.

Canons of the Church in Scotland.

1. Deed of Election of the Primus.
 2. Form of a Mandate for the Election of a Bishop.
 3. Declaration to be Signed by the Presbyters at the Election of a Bishop.
 4. Form of Letters Testimonial for Holy Orders to be subscribed by Two or more Episcopal Clergymen.
 5. Form of *SI QUIS*, to be read from the Desk after Morning Prayers, on some Sunday at least two weeks before the day appointed for the Ordination.
 6. Form of Letters Dimissory, for Ordination.
 7. Form of Subscription to the Thirty-Nine Articles of Religion.
 8. Form of Subscription promising Obedience to the Canons.
 9. Form of a Deed of Presentation to a Pastoral Charge.
 10. Form of Testimonial for Institution to a Pastoral Charge, to be subscribed by Two or more Episcopal Clergymen.
 11. Form of Institution to a Pastoral Charge.
 12. Form for appointing a Dean.
 13. Form of Licence to a Deacon or Priest.
- Attestation of the Correctness of the Canons.

1. *For preserving the Episcopal Succession.*

The Episcopal Church in Scotland, as a branch of the Holy Catholic and Apostolic Church of Christ, inviolably retaining in the sacred Ministry the three Orders of Bishops, Priests, and Deacons, as of Divine Institution, requires, according to the Apostolic Canon, that a Bishop be ordained by two or three Bishops; not fewer than three in all ordinary cases; and Priests and Deacons by one Bishop; the right of ordination belonging to the order of Bishops only. And it is hereby decreed, that no person shall be consecrated a Bishop of the Episcopal Church in Scotland before he hath completed the Thirtieth year of his age; nor without the consent and approbation of the majority of the Bishops; and that if any Bishop or any Bishops, not being a majority, shall presume without such consent to consecrate any person to that office, all the parties concerned shall be held schismatics.

2. *Regulating the Election and Office of the Primus.*

Before the distinction of Archbishop was introduced into Scotland, one of the Bishops had a precedency under the title of *Primus Scotorum Episcoporum*; and the Episcopal College having for a century past adopted the old form, it is hereby decreed that the Bishops shall, without respect either to seniority of consecration or precedency of Diocese, choose a Primus, by a majority of voices, who shall have no other privilege among the Bishops but the right of convoking and presiding, and that expressly under the following restrictions: 1st, That he shall be obliged to notify to the other Bishops the reasons of his calling a Meeting, as well as the time and place for holding it; and if the majority shall dissent, as judging either the reasons insufficient, or the time

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or place improper, the proposal of such meeting shall be either wholly set aside, or the time or place altered, as shall seem to them most expedient. 2ndly, That if the Primus shall at any time refuse to call a Meeting when desired by a majority of the other Bishops to do so for some specified purpose, or if he shall refuse to consecrate or sanction the Consecration of a Priest, canonically elected to a vacant Diocese, when that election shall have been confirmed by a majority of the Bishops, they shall, in such cases, have authority to meet and act without him. 3dly, That the Primus thus chosen by the majority is to continue in that office only during their pleasure. That the Church may suffer as little inconvenience as possible by the death or resignation of the Primus, the Senior Bishop shall instantly succeed to his powers, until a majority of the Bishops shall appoint one to the office by a formal Deed of Election (a).

3. *For providing vacant Dioceses with duly elected Bishops, and regulating the Conduct of the Presbyters in such Dioceses.*

Every Bishop is hereby required to appoint one of the Presbyters of his Diocese to act under him as Dean, who, in the absence of the Bishop, shall preside in all Diocesan Synods; and the Dean thus canonically appointed shall, upon the demise or translation of any Bishop, notify the same to the Primus, who, being empowered by his Colleagues, shall thereupon issue a mandate (b) to the Presbyters of the vacant Diocese, requiring them to proceed to the election of a successor. Should they make choice of a person already invested with the Episcopal Character, the Bishop so elected shall have no jurisdiction over that Diocese, unless his election be ratified by the majority of the Episcopal College transferring to him, by a formal deed, the superintendence of the Diocese. But if the Presbyters of the vacant Diocese shall elect a Presbyter to be their future Diocesan, of whose fitness for that office the Bishops shall declare they have sufficient reason not to be satisfied, in that case the Presbyters shall be required to proceed to a new election.

During the vacancy of any Diocese, if any case relating to Discipline shall occur for which there is no particular provision made by the Canons of this Church, the Presbyters shall have recourse to the Primus, who, with the advice and consent of his colleagues, shall determine the same, and who shall also provide for the performance of any Episcopal offices that may be required among them.

All elections of Bishops shall be notified to the Primus, according to the Form prescribed, No. 3.

4. *For the Appointment of Coadjutor-Bishops.*

It shall be lawful for a Bishop, whose age or infirmities require it, of which the majority of the College of Bishops shall be the Judges, to have a Coadjutor or Assistant, provided the said Bishop consent that the Election of such Coadjutor by the Clergy of the Diocese shall be free, uninfluenced, and unbiassed, and provided the person so elected shall succeed on the death or resignation of the Diocesan. Such Assistant-Bishop, during the life of his principal, shall be entitled to attend the Episcopal and General Synods of the Church, to give his opinion and advice on any matter under consideration, but to have no vote except in the absence of the Diocesan Bishop.

5. *Respecting the Jurisdiction of the Bishops in a Particular Case.*

If it shall happen that a Bishop has his Chapel and residence within the Diocese of another Bishop, a practice to be justified only by the circumstances of this Church, then shall his Congregation, as well as any Presbyter or Deacon that may be employed as his Assistant, be exempted from the jurisdiction of the Bishop in whose Diocese they are locally situated, the latter being required to signify, by a subscribed deed, his consent to this arrangement. But such Assistant shall have no vote in either Diocese.

(a) See Form, No. 1.

(b) See Form, No. 2.

But whereas the residence of a Bishop within the diocese appears to be expedient for the good of the Church, it is hereby decreed that every Bishop hereafter collated to the charge of a Diocese shall reside within the bounds of the same, wherever that is found practicable.

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6. *Enjoining the Studies and Qualifications of Candidates for Holy Orders.*

In the Canons intended for the Church of Scotland, and sanctioned by Royal Authority in the year 1635, the Second Chapter, entitled "*Of Presbyters and Deacons, their nomination, ordination, function, and charge,*" is thus very properly introduced: "Forasmuch as the weight of the Ministerial Calling doth require such a measure of sufficiency as human weakness can attain unto, and is often discredited by the ignorance, insufficiency, and scandalous conversation of many who undertake the same, it is ordained that no person hereafter shall be admitted to that holy function who hath not been bred in some University or College, and hath taken some degree there, and who shall verify the same by the subscriptions and seals of the University or College where he received the Degree of Learning." In conformity with the spirit of this extract, it is hereby decreed that no person be received as a Candidate for Holy Orders in this Church who shall not have first gone through a regular academical Course in some University or College. It is, moreover expressly ordered, that no person shall be admitted into the Holy Order of Deacons in this Church, until he shall have been properly examined as to his literature by two or more Presbyters appointed for that purpose by the Bishop who is to ordain him, and whom, as his examiners, he must satisfy of his being sufficiently acquainted with the whole of the New Testament in the original Greek, and at whose bidding he must compose a short treatise in Latin on some Article of Faith, as also a Discourse in English on any text of Scripture which they shall prescribe; and answer such questions connected with Theology and Ecclesiastical History as they shall think proper to put to him; and before his admission to examination, the Bishop must, by sufficient Letters Testimonial (c), and by an attestation that the form usually called *Si Quis* (d) has been publicly read, be satisfied of his good life and conversation, as well as his good learning. It is also required that he produce a certificate of his having attended at least one course of the Lectures of the Pantonian Professor of Theology, and of our Professor of Ecclesiastical History in Edinburgh; unless peculiar circumstances in his case may have rendered such attendance impracticable, of which the ordaining Bishop is to be the sole Judge. And no one shall be promoted to the Order of Priest until he shall have passed a still more full and complete examination.

7. *Respecting the Age, the Prudence, the Place or Charge of Persons to be Ordained; and in what Case Letters Dimissory are necessary.*

No Bishop of this Church shall, in ordinary cases, admit any person to the office of Deacon, until he shall have attained the age of twenty-three years; and in no case to the order of Priests until he shall have attained the full age of twenty-four; and in both cases a *bona fide* title shall be required: But whereas the necessities of this Church, in some cases, may render it inconvenient to defer ordination till the person to be ordained hath fully attained what hath been usually called the canonical age, therefore, in any such case a Bishop may admit a Candidate to the order of Deacons, if duly recommended, when he hath completed his twenty-first year; and after serving in that capacity, he may be promoted to the order of the Priesthood, if the Bishop be satisfied that during his service as a Deacon he hath conducted himself in a prudent and becoming manner; hath attained the full canonical age of twenty-four; and *hath also a particular place or charge assigned to him, wherein he may use or exercise his function*; without which relation to a particular place or Congregation no person shall be advanced to the Order of Priesthood in this Church; neither shall any of the Bishops admit any person

(c) See Form, No. 4.

(d) See Form, No. 5.

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into Holy Orders whose title is not within his own Diocese, unless he shall bring Letters Dimissory from the Bishop of the Diocese wherein his charge is placed (e).

8. *Appointing the Solemn Performance of the Office of Ordination, and the Form to be used in Making, Ordaining, and Consecrating Bishops, Priests, and Deacons.*

The welfare of the Church being most intimately connected with the ordination and function of the Clergy, the Ancient Fathers, led by the example of the Holy Apostles, appointed Prayers and Fasts to be used for imploring the Divine blessing and direction in setting apart for their solemn office those who were "ordained for men in things pertaining to God." The Episcopal Church in Scotland, therefore, sincerely venerating the appointment of the Ember Weeks, hereby requires that all her ordinations shall be performed at those seasons, unless, for reasons of necessity, the Bishop shall appoint another time; and also that all her Ordinations be performed with public prayer, and imposition of hands, and (as hath been the practice of the Church ever since the Restoration of King Charles II.) according to the "form and manner of making, ordaining, and consecrating of Bishops, Priests, and Deacons," used in the United Church of England and Ireland, adopting only a few necessary verbal alterations, such as saying, "this Church," instead of "this realm," or "this Church of England."

9. *Requiring from Persons to be Ordained Subscription to the Thirty-Nine Articles of Religion, and certain Oaths to be taken by them.*

Whereas by the Act of the Thirty-second of George III., entitled "An Act for granting relief to Pastors, Ministers, and Lay Persons of the Episcopal Communion in Scotland," it is enacted, that every such Pastor or Minister shall subscribe a declaration of his assent to the Thirty-nine Articles of the Church of England: Therefore, no person shall hereafter be received into the Ministry of the Episcopal Church in Scotland until he hath first subscribed (*according to the Form subjoined, No. 7,*) willingly and *ex animo*, to the Book of Articles of Religion, agreed upon by the Archbishops and Bishops of both provinces of the realm of England, and the whole Clergy thereof, in the convocation holden at London in the year of our Lord one thousand five hundred and sixty-two, and hath acknowledged all and every the articles therein contained, being in number thirty-nine, besides the ratification, to be agreeable to the Word of God. And forasmuch as the Bishops of this Church have no authority to administer the oaths which are required by Law, at the Ordinations of Deacons and Priests, every Bishop shall, at the Ordination of any Candidate for the Ministry, obtain the presence of a Magistrate at the time of Ordination, for the purpose of administering the oaths at the regular period of the service; but if this cannot be done, he is to require from such Candidate a Certificate from the Magistrate before whom he shall have taken the said oaths; and together with these oaths, every person at his ordination shall promise (*according to the Form, No. 8,*) to render due obedience to the Canons of this Church, and to show in all things an earnest desire to promote the peace, unity, and order of that part of the flock of Christ in which he shall be authorised to exercise his ministry.

10. *Appointing the Conditions, and Mode of Institution to a Pastoral Charge.*

Whereas it has never been the practice of this Church, nor the wish of her Bishops, to interfere, directly or indirectly, with the funds or temporalities of her Congregations; it is, therefore, fully acknowledged, that the right of presentation to any Chapel, vacant within her pale, is vested in those who are appointed to manage its affairs, whether known by the title of Trustees, Churchwardens, Vestrymen, Managers, Proprietors, or Directors, and who, in virtue of their office, procure the means of the Minister's support; yet, to

(e) For the Form of Letters Dimissory, see Form, No. 6.

preserve the ancient and regular discipline of an Episcopal Community, it is hereby enacted, that no Presbyter shall take upon himself the Pastoral charge of any Congregation to which he may be presented, before the Deed of Presentation (*f*) be duly accepted by the Bishop: And no Bishop shall institute to a pastoral charge in his Diocese any Clergyman, without requiring him to produce Letters of Orders from some Bishop of this Church, or of one of the Churches enumerated in Canon 15, together with the proper testimonials required for institution, countersigned by the Bishop of the Diocese. Likewise, it is required that he shall present a certificate that he has gone through a regular Course of Education in some College or University, as is required of our own native Students by Canon 6. And if the Candidate for Institution shall have come from any one of these Churches, and have resided in Scotland for any length of time, he must present not only the proper Testimonials from his Mother Church, but likewise a similar Testimonial from two or more Episcopal Clergymen, to whom he has been known during the period of his residence in Scotland (*g*), as well as a solemn promise of obedience to the Canons of this Church, as enjoined by Canon 9 (*h*), in which case no Bishop shall refuse to grant institution to a person so presented. But if no election shall be made within six calendar months after a vacancy hath taken place, the right of nomination of a Pastor shall then lapse to the Bishop of the Diocese, whose appointment shall be binding on all the members of the Congregation. (*For the Form of Institution, see No. 11.*)

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11. *Requiring Presbyters to make Personal Residence in the Place where their Pastoral Charge lies, and not to be absent but for a limited time.*

In Chapter III. of the Scottish Canons above mentioned, entitled, "Of Residence and Preaching," it is justly observed, that "the many inconveniences which result from the Non-residence of Ministers, require that some provision be made thereanent:" Therefore, it is hereby decreed, that every Presbyter having a Pastoral Charge in this Church shall reside in some place of easy and convenient access to the members of his Congregation, and shall not at any time leave or absent himself from his Charge, (unless for some very urgent cause,) without providing a substitute, in terms of Canon 15, and also obtaining the permission of the Bishop.

12. *Requiring Soberness of Conversation and Decency of Apparel in Ecclesiastical Persons, as well as a proper attention to the Good Order of their Families.*

In the Canons of the United Church of England and Ireland, as well as in those intended for the Church of Scotland, it is expressly ordered, that "no Ecclesiastical Persons shall at any time, other than for their honest necessities, resort to any taverns or alehouses, neither shall they give themselves to any base or servile labour; or to drinking or riot, spending their time idly by day or by night, playing at dice, cards, or tables, or any other Unlawful Games unbecoming their sacred function; but at all times convenient they shall hear or read somewhat of the Holy Scriptures, or shall occupy themselves with some other honest study or exercise, always doing the things which appertain to honesty, and endeavouring to profit the Church of God." To the Spirit of what is here enjoined, the Clergy of this Church are therefore required carefully to attend: And they shall use such a decent form of Apparel as becomes their Sacred Character; avoiding every appearance of fashionable levity, either in dress or demeanour, that is inconsistent with the gravity of their profession, or which might deprive it of that respect which is due to it. For the same reason, the Ancient Canons of the Church did strictly prohibit "the admitting of any to the office of a Bishop, Presbyter, or Deacon, who had not brought their families to be Christians," whereby all ecclesiastical persons are taught the necessity of looking well to the order and good government of their Households, and of training up their families

(*f*) See Form, No. 9. (*g*) See Form, No. 10. (*h*) See Form, No. 8.

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in such a religious course as may show to others an encouraging pattern of piety and virtue. All which must be duly observed under pain of the Censures of the Church, to be inflicted according to the quality of the offence.

13. *Pointing out the Proper Clerical Studies.*

A studious life being of great consequence to the right discharge of the Duties of the Clerical Office, it is hereby earnestly recommended that the Clergy of this Church apply themselves diligently to the study of the Holy Scriptures in the Original Languages, and the Writings of the Fathers of the Apostolic and two next succeeding ages, and that the Younger Clergy, in particular, be attentive and diligent in the course of study prescribed to them, so that they may be able to answer such questions as the leading Books in that course may suggest, and which the Bishop at his visitation may think proper to put to them, as well as that they may be able in their Sermons, and otherwise, to instruct the people under their Charge in the truly Catholic principles of that pure and primitive Church.

14. *Requiring the Clergy of this Church to continue in their Sacred Profession.*

As every Clergyman of this Church, as well as of the United Church of England and Ireland, at the time of his receiving authority to execute the office of a Deacon, declares himself to be "inwardly moved by the Holy Ghost" to take upon himself this office and ministration, to serve God for the promotion of his Glory and the edifying of his people; therefore, in order that he may be warned of the danger of dissembling with the Spirit of Truth, it is hereby declared, that if any person exercising his ministry in this Church shall afterwards give up the exercise of his ministerial functions, and betake himself wholly to any worldly business, he shall be incapable of ever resuming the exercise of any ministerial office in the Church, the sacred service of which he hath thus shamefully abandoned.

15. *Concerning the Admission of Strangers to Officiate in this Church.*

The Episcopal Church in Scotland recognizes as in full communion with herself the United Church of England and Ireland, the Colonial Branches of the same, and the Protestant Episcopal Church in the United States of America; and it is hereby decreed, that none but Clergymen canonically ordained by the Bishops of the Scottish Episcopal Church, or of the above-mentioned Churches, or Episcopally ordained Clergymen, conforming to the Doctrine and Discipline of the said Churches, shall be permitted to officiate in sacred things, either permanently or occasionally, to any Congregation in this Church. And, moreover, it is decreed, that no Clergyman shall henceforth be permitted to officiate in this Church, unless his principles and clerical character be known to the Clergyman by whom he is to be employed, to be correct and consistent with the doctrine and discipline of the Scottish Episcopal Church; and if he be personally unknown, unless he produce from the Bishop of the Diocese whence he comes, or from some other Clergyman known to be worthy of all credit, a letter of recommendation; and no Clergyman shall officiate in this Church beyond the period of one month without the licence of the Bishop.

16. *The Names of Stranger Preachers to be Noted in a Book.*

That the Ordinary may be able to ascertain the nature of the Doctrine taught in every Chapel of his Diocese, the Pastor of each Congregation shall see that the names of all the Preachers who come to his Chapel from any other place be noted in a book which he shall keep in his Vestry for that purpose, wherein every Preacher shall inscribe his name, the day when he preached, the title of the Bishop by whom he was ordained, and the date of his Ordination.

17. *Respecting the due Administration of the Sacrament of Baptism.*

As the Sacrament of Baptism is to be considered a public act, it ought, unless unavoidable circumstances prevent it, to be administered in a place of

public worship. Parents, therefore, ought to be admonished of the propriety of bringing their children to be baptized to the place where they usually assemble for Divine service; and either of becoming Sponsors themselves, or of procuring Godfathers or Godmothers, who shall always be communicants, that the Church may be certified, that all who are admitted within her pale will be brought up in the knowledge and practice of Christianity. But as uniformity in the administration of this Sacrament is as desirable as in the other services of the Church, the privacy of the administration shall be no reason for any departure from the form prescribed for public use, to which the Minister shall always strictly adhere, except in cases of extreme danger, where the form of private Baptism shall be used as directed by the Rubric. And whereas, from the unhappy multiplicity of religious sects in this country, cases frequently occur in which persons, from conscientious motives, express a desire to separate themselves from such sects, and to unite themselves to the Episcopal Communion, it becomes a matter of serious importance to furnish a rule to the Clergy, by which they may be directed in such cases. It is therefore enacted, that in all instances where the applicants shall express a doubt of the validity of the Baptism which they have received from the Minister of the sect to which they formerly belonged, the Clergyman of the Scottish Episcopal Church to whom the application is made, shall baptize the person in the form of words prescribed in the Book of Common Prayer by the Church of England in cases of doubt—"IF THOU ART NOT ALREADY BAPTIZED, N., I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost. Amen."

And whereas the Episcopal Clergy are frequently called upon to baptize infants whose parents are not members of the Church, it is hereby enacted, that the Clergy of this Church shall not administer the Sacrament of Baptism except to Children for whom proper Sponsors are provided.

18. *Requiring a regular Course of Catechising in all Congregations.*

The Christian Church having ever maintained the necessity of early and sound instruction in the first principles of her Holy Faith, it is therefore hereby enacted, that constant attention be shown to this important duty; for which purpose, the season of Lent, and other convenient time on Sundays or Holidays, shall be set apart for examining and instructing the young members of every congregation in the Catechism contained in the Book of Common Prayer; but no Catechism shall be used in the further instruction of the young but such as is approved and sanctioned by the Bishop of the Diocese. And the Clergy shall earnestly exhort and admonish their people respecting the great usefulness of this mode of instruction, and point out to parents, and others who may have the charge of young persons, the necessity of bringing them regularly to be catechised.

19. *Appointing Confirmation to be Administered in every Diocese once in Three Years, and the care to be taken that due preparation be made for that solemn Service.*

Whereas it has been a sacred and solemn appointment in the Christian Church, continued from the times of the Apostles, that all Bishops should in their several Dioceses regularly administer the Holy Ordinance of Confirmation by imposition of hands upon persons who have been baptized and duly instructed in the principles of Christ's religion. Therefore, it is hereby enacted, that every Bishop of this Church shall visit his Diocese, if he be able to do it, once in three years, and administer this sacred Ordinance in every congregation within the same; and if unable to visit his Diocese personally, he shall obtain one of his colleagues to do so in his stead. And every Pastor or Minister, on receiving information from the Bishop of the time of his triennial visitation, shall use his best endeavours to prepare for Confirmation those whom he is to present to the Bishop to be confirmed; giving him a list of their names, and being ready to answer any questions he may put respecting their age and qualifications.

20. *Requiring due Intimation and Preparation to be made for the Holy Communion.*

In every Congregation of this Church, the Holy Sacrament of the Lord's Supper shall be administered, so often and at such times, as that every member of the Congregation, come to a proper time of life, may communicate at least three times in the year, whereof the Feast of Easter, or of Pentecost, or of Christmas, shall be one. Due warning shall be publicly given to the Congregation during Divine Service on the Sunday before each Holy Communion, that the people may the better prepare themselves for the participation of that venerable Sacrament. For this purpose, every Clergyman shall pay attention to the spirit and design of the Rubrics prefixed to the order for the administration of the Lord's Supper in the Book of Common Prayer; and shall be diligent in enforcing the duties there prescribed on all those who are committed to his pastoral charge, instructing them carefully in the nature and design of that Holy Sacrament, and warning them of the danger of receiving the same unworthily. And because strangers, or those who have but lately joined his congregation with the intention of remaining therein, cannot always be so well known to him as to enable him to judge whether they be meet to be partakers of those Holy Mysteries; such persons, if required by him, shall produce from the Clergyman to whose congregation they formerly belonged, or in case of a vacancy, from some respectable member of this Church, an attestation that they are regular communicants in the Episcopal Church.

21. *Respecting the Communion Service as the most Solemn Part of Christian Worship.*

Whereas it is acknowledged by the Twentieth and Twenty-fourth of the Thirty-Nine Articles, that "not only the Church in general, but every particular or National Church, hath authority to ordain, change, and abolish ceremonies or rites of the Church ordained only by man's authority, so that all things be done to edifying;" the Episcopal Church in Scotland, availing herself of this inherent right, hath long adopted, and very generally used, a form for the Celebration of the Holy Communion, known by the name of the *Scotch Communion Office*, which form hath been justly considered, and is hereby considered, as the authorised service of the Episcopal Church in the administration of that Sacrament. And as, in order to promote an union among all those who profess to be of the Episcopal persuasion in Scotland, permission was formerly granted by the Bishops to retain the use of the English Office in all congregations where the said Office had been previously in use, the same permission is now ratified and confirmed: And it is also enacted, that in the use of either the Scotch or English Office no amalgamation, alteration, or interpolation whatever shall take place, nor shall any substitution of the one for the other be admitted, unless it be approved by the Bishop. From respect, however, for the authority which originally sanctioned the Scotch Liturgy, and for other sufficient reasons, it is hereby enacted, that the Scotch Communion Office continue to be held of primary authority in this Church, and that it shall be used not only in all consecrations of Bishops, but also at the opening of all General Synods.

22. *Respecting the Solemnization of Matrimony.*

The law of the land having required the publication of Banns before Marriage, no Clergyman of this Church shall take upon him to solemnize matrimony without having previously received a sufficient attestation that the Law in this respect hath been duly complied with. He shall not join persons in matrimony who are within the forbidden degrees, nor under the age of twenty-one years, unless with the consent of their parents or guardians. In the solemnization of matrimony such prayers only shall be used as are contained in the form prescribed in the Book of Common Prayer.

23. *Respecting the Visitation of the Sick, and the Burial of the Dead.*

As in all the days of their spiritual warfare, from their baptism to their

burial, Christians have provided for them the benefit of assistance from the Ministry of the Clergy, so ought they more especially to apply for this spiritual aid in the time of sickness, when their need of such assistance is more urgent. Therefore, it is hereby enacted, that when any Presbyter or Clergyman of this Church is called to visit any sick member of his congregation, he shall not neglect to perform this duty; but repairing to the sick person's house, shall be there ready to administer all suitable comfort and instruction, either according to the order for the visitation of the sick as appointed in the Book of Common Prayer, or in any other way as he shall think most needful and convenient; and take the advice or direction of his own Bishop in any case which may particularly call for it. When the prayers of the congregation are desired in behalf of any sick member of it, the Clergyman is at liberty to use the Collect appointed for the Communion of the Sick, inserting after the words "visited with Thine hand," the words "for whom our prayers are now desired;" or any other of the prayers in the "Order for the Visitation of the Sick," as the case may require. And he shall also be ready to do the last duty when he shall be called upon to read the "Order for the Burial of the Dead," which he shall use as prescribed in the Book of Common Prayer, as far as circumstances will permit that order to be observed by the Clergy of this Church.

24. *Registers to be kept by every Clergyman.*

It is decreed, that every Clergyman of this Church shall keep a correct Register of Baptisms, Marriages, and Burials, Catechumens, and Communicants at the several festivals and other celebrations; which, if required, he shall produce to the Bishop at the time of his visitation, and also take care that such register may be given to the person who succeeds him in his pastoral charge.

25. *Against exacting Money for Performance of Occasional Duties.*

It is decreed, that no Minister in this Church shall make, or permit the Officers of his Chapel to make, any charge of money for the administration or registration of Baptism, Marriage, or any other ecclesiastical service, under pain of Ecclesiastical Censure, and of suspension if he persist against the reproof of his Ordinary: But it is to be understood, that no Minister is hereby precluded from accepting a gratuity spontaneously offered.

26. *Enjoining a Reverent Observance of the Lord's Day.*

It is required of every member of this Church to hallow the Lord's Day and keep it holy; which duty will be best fulfilled by "not doing on that day" "our own ways, nor finding our own pleasure, nor speaking our own words;" but by a regular and devout attendance in the sanctuary to learn God's ways, to find His pleasure, to be taught His word, and to join in the petitions, confessions, and thanksgivings of the Church; always bearing in mind, that, at the appointed and stated hours of public worship, no one can absent himself from the congregation without crime; unless his absence be caused by illness, or some other equally urgent occasion, or necessity of life; or that he be engaged in a work of charity and mercy.

27. *Regulating the Times, and Public Assemblies for Divine Service, on other Days besides Sundays.*

Whereas, in the Episcopal Church in Scotland, and in conformity with the practice of the Church Universal, besides the Lord's Day, certain solemn days, especially the Anniversaries of our Saviour's Birth, Crucifixion, and Ascension, have been always observed for the public worship of God, it is hereby decreed, that the Clergy do reverently and devoutly attend to these sacred solemnities, and to the regular celebration of Divine service in their several congregations; that the people, being accustomed to see every thing, according to the Apostles' rule, "done decently and in order," may be ready and well disposed to bear their part in that form of worship which is so well

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calculated to impress on their minds a just sense of that which they are taught to believe as an article of their Creed, "The Communion of Saints."

28. *On the Uniformity to be observed in Public Worship.*

As in all the ordinary parts of Divine Service it is necessary to fix, by authority, the precise form, from which no Bishop, Presbyter, or Deacon, shall be at liberty to depart by his own alterations or insertions, lest such liberty should produce consequences destructive of "decency and order," it is hereby enacted, that in the performance of Morning and Evening Service the words and rubrical directions of the English Liturgy shall be strictly adhered to: And it is further decreed, that if any clergyman shall officiate or preach in any place publicly without using the Liturgy at all, he shall, for the first offence, be admonished by his Bishop; and if he persevere in this uncanonical practice, shall be suspended, until after due contrition he be restored to the exercise of his clerical functions. In publicly reading Prayers and administering the Sacraments, the Surplice shall be used as the proper Sacerdotal Vestment.

29. *Enjoining all due Reverence and Attention in Time of Divine Service.*

It is hereby decreed, that all proper care be taken of the Places of Public Worship in this Church, and every endeavour used to have them decent and commodious, kept thoroughly clean and in good repair, and that they be used only for sacred and religious purposes. In the time of Divine Service the most devout attention shall be given by the people to what is read, preached, or ministered. And that they may glorify God in body as well as in spirit, agreeably to what an Apostle enjoins, they shall humbly kneel when the General Confession, the Litany, and other Prayers are read, *making the appointed Responses with an audible voice, in a grave and serious manner*; and shall reverently stand up at the repetition of the Creed, and at the Reading or Singing of the Psalms, Hymns, or Anthems, bowing devoutly at the name of Jesus in the Creed: and when the Minister mentions the Gospel for the Day, the people, rising up, shall devoutly say or sing (where the custom hath so been) "Glory be to Thee, O God." And in like manner, when the Minister declares the Holy Gospel to be ended, they shall answer, "Thanks be to Thee, O Lord, for this thy glorious Gospel." During the time of Divine Service no person shall depart out of the place of worship without some urgent and reasonable cause.

30. *Respecting National Fasts and Thanksgivings.*

All National Fasts and Thanksgivings enjoined by the Civil Authority shall in this Church be religiously observed; and every Bishop shall give Directions to his Clergy what form of Prayer they are to use on such particular occasions.

31. *For Appointing Diocesan Synods, and regulating the Business of the same.*

A Diocesan Synod shall be holden annually in every Diocese of the Church at such time and place as the Ordinary or as the Dean empowered by him shall appoint, and shall consist of the Bishop, the Dean, and such Clergymen as have been instituted to their charges; and shall be attended by all the Clergy of the Diocese, unless hindered by some sufficient cause, whereof notice shall be given to the Diocesan. And if no such notice be given, the Absentee shall be subjected to the censure and reprimand of his Ordinary. Previously to the Sitting of the Synod, Divine Service shall be performed, and a sermon preached by one of the Clergy in rotation. After which, the Synod being duly constituted by the Ordinary, or in his absence by the Dean, every Incumbent shall lay before the Meeting a Report of the State of the Congregation under his charge, containing the number of Souls and Communicants in it, of Baptisms, Marriages, and Deaths, of persons catechised and confirmed, of communicants at the several festivals and other communions, and a List of the Stranger Clergymen who have preached in his Chapel within

the year, and such other particulars as the Bishop shall prescribe: All which reports shall be entered by the Clerk in the Diocesan Minute Book. Every Diocesan Synod may also suggest rules for the regulation of Ecclesiastical Affairs, which, if approved by the Bishop, and not inconsistent with the constitution and Canons of the Church, shall have the force of Laws within the Diocese.

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32. *Appointing General Synods, and regulating the Business of the same.*

Every General Synod shall consist of Two Chambers; the first composed of the Bishops alone; the second of the Deans, the Pantonian Professor of Theology *ex officio*, and the Representatives or Delegates of the Clergy; one such Delegate being chosen by and from the Incumbents of each Diocese. The Second Chamber shall elect a Preses or Prolocutor, who shall at all times have free admission to the First Chamber, when communication is on either side required.

Canons or Rules for the Order and Discipline of the Church shall be made and enacted by a General Synod only; and no Law or Canon shall be enacted, abrogated, or altered, but by the consent and with the approbation of the majority of both Chambers. If the Chambers shall happen to be equally divided in their opinions on any question, the Primus in the Upper House, and the Prolocutor in the Lower, shall have the casting vote.

And whereas the assembling of a General Synod can only be necessary when important business occurs in the Church, it is hereby decreed, that the times for holding such Synods shall be left to the determination of a numerical majority of the Bishops. When any Bishop is disabled from being personally present at a General Synod, through infirmity or pressing inconvenience, (to be duly notified to the Primus, and by him to the other Bishops,) he may propose to the Synod, in writing, any measure which he shall judge expedient, or express his opinion concerning any question or matter to be brought before the Synod, which opinion shall be entitled to due consideration and respect, but shall not be held as his canonical vote.

When a General Synod shall be convoked, or an Episcopal Synod called, for any specified purpose, the Bishop who shall neglect to attend either of these Meetings, without sending to the Primus a sufficient excuse for his absence, arising either from bad health, the infirmities of old age, or some very important business which absolutely demands his presence elsewhere, shall incur such a censure by his colleagues in office as to the majority of them his conduct may appear to deserve.

And any Member of the other Chamber, whether Dean, or Delegate, or Professor, who, without sending a similar excuse either to the Primus or to his own Diocesan, shall neglect to attend a General Synod to which he has been regularly summoned, shall, if a Dean, be deprived of his office, and if a Delegate, be declared inadmissible to any future Synod.

33. *On the Legislative power of General Synods.*

A General Synod of the Church, duly and regularly summoned, has the undoubted power to alter, amend, and abrogate the Canons in force, and to make new Canons; and the said alterations, amendments, abrogations, and new Canons, being in conformity with the recognized constitution and acknowledged practice of this Church, shall not only oblige the minority in the said Synod, but all the absent members of the Church.

34. *Appointing Episcopal Synods.*

It is hereby decreed, that an Episcopal Synod shall be holden every year, at such time and place as the majority of the Bishops shall appoint; and that no such Synod shall be deemed canonical unless three Bishops at the least be present. Episcopal Synods shall receive appeals from either Clergy or Laity against the sentence of their own immediate ecclesiastical superior.

35. *Prescribing the Conditions of Appeal.*

In any differences which may arise between a Pastor and members of his

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flock, which cannot be amicably settled, the matter in dispute must be carried in the first instance before the Ordinary: And if either party think themselves aggrieved by his decision, then the case may be appealed by letter or petition to a Synod of Bishops. But no such case can be carried before an Episcopal Synod until the Ordinary's decision be first had thereon: And no appeal against his decision shall be admissible unless the contending parties solemnly promise to hold the sentence of a majority of the Bishops present final and conclusive; such regulation being conformable not only to the Canons of the Universal Church, but also to the principle laid down by our Saviour himself: "If he neglect to hear the Church, let him be unto thee as an Heathen man and a Publican."

And moreover, it is further provided by this statute, that if any dispute arise between a Deacon and his Bishop, or a Presbyter and his Bishop, (the Congregation in which the Deacon or Presbyter officiates in no way participating therein,) it shall be lawful for the said Deacon or Presbyter to appeal to the Episcopal College, under the condition already specified, viz. that the Appellant give a solemn promise to receive the sentence of a majority of Bishops canonically assembled as final and conclusive.

In all cases of appeal, the Appellant or Appellants may be heard personally in his or their own defence, but not by Counsel.

36. *Respecting Accusations against Bishops, Presbyters, and Deacons.*

No accusation shall be received against a Deacon, or Presbyter, or Bishop, unless proceeding from and supported by the testimony of credible persons, who are regular communicants in the Scottish Episcopal Church: Nor shall the testimony of a single witness be considered as sufficient to establish the charge, for the Scripture saith, "In the mouth of two or three witnesses shall every word be established." But if a Bishop be accused, and the accusation, proceeding from three or more respectable persons, lay or clerical members of the Scottish Episcopal Church, be lodged before the Primus, or in case of the Primus being accused, before the next senior Bishop, he shall be cited to appear and plead; and if he do not obey the summons, he shall be cited a second time, in the name and by the authority of the Episcopal College; and if he be then guilty of contempt in not appearing, let the College pronounce against him such sentence as they think fit, that he may not be a gainer by declining justice.

It is further provided by this Canon, that if, without any formal accusation, a Bishop shall have reason to believe that any one of his Clergy is faulty in any matter; if the matter be of small importance, and not implying any grave delinquency in doctrine, discipline, or morals, the Bishop shall deal privately with the erring Brother, and admonish him of his error; but if such remonstrance be neglected, or if the fault be of a grave or scandalous nature, then the Bishop shall, after due notice of the charge, stated in precise terms to the parties concerned, summon them before himself sitting in Diocesan Synod, and shall appoint the Dean, or if necessary some other Presbyter, to state the charge and bring forward the evidence; and having fully heard both the accuser and the accused, and all the evidence that either can produce, he shall, after having received the opinion of each member of the Synod, proceed to pronounce sentence; and if the accused shall appeal against the sentence of his Bishop to the College of Bishops, as is by the preceding Canon declared to be lawful, the College shall, as speedily as possible, and at latest within six months, examine and decide upon the appeal.

37. *Prohibiting the Clergy of one Diocese from interfering with the Concerns of another.*

It is hereby decreed, that the Clergy of one Diocese must not interfere in the concerns of another, nor take any direction for their official conduct but from their own Ordinary; it being always understood that they shall retain the right of appealing from any sentence of their own Bishop, by which they

may think themselves aggrieved, to the Primus and other comprovincial Bishops in Synod canonically assembled.

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38. *Providing for the Clergy and Laity of this Church being furnished with an accurate view of its State and Condition from time to time.*

Whereas, under Providence, no measure seems better adapted to promote the welfare and stability of this Church, or to perpetuate harmony and concord among its members, than that they should be accurately informed as to its actual state and condition, it is hereby ordained, with a view of attaining this desirable object, that the Bishops, when assembled in the annual Episcopal Synod, shall, if they deem it necessary, issue a pastoral letter containing an account of all the circumstances and occurrences, adverse as well as prosperous, which they think it may be for the benefit of the Church to be generally known; and the pastoral letter agreed upon by the Bishops shall be printed, and a sufficient number of copies sent to each Ordinary to supply the charges under his jurisdiction, who shall require the Incumbent of every charge to read the pastoral letter to his congregation during the time of Divine Service, on the first Lord's Day after he receives it that may be most convenient.

39. *Appointing the mode of admitting new Congregations into the Church.*

Should any number of Episcopalians, living in any town or village in Scotland where there is an Episcopal Chapel already in existence, entertain a desire to be formed into a Congregation in communion with this Church, it is hereby decreed that the following mode of procedure be adopted.

1st. A meeting of the *bona fide* Episcopalians, or of persons desirous of becoming such, who wish to form such congregation, shall be held agreeably to a public advertisement; at which meeting, when duly constituted, a resolution expressive of their intentions, together with the reasons that render it necessary that such new congregation should be formed, shall be formally drawn up, and signed by all the applicants, to be transmitted to the Bishop of the Diocese within which the town or village is situated.

2dly. The Bishop, upon receiving such notification, shall, after consulting the Presbyters of his Diocese, communicate to the applicants his determination. Should he follow the advice given him by a majority of his Presbyters, his determination shall be final; but if he shall decide against the majority, the applicants, or any party or parties who may consider themselves aggrieved by the decision, may appeal to the College of Bishops, and shall have the right to appear before them by a delegate, to state the grounds of their appeal.

3dly. Should the Bishop, with the advice already mentioned, find it expedient to sanction the formation of the proposed Congregation, the Congregation thus formed and acknowledged shall then proceed to elect a Minister, according to Canon 10, and present him to the Bishop, agreeably to the Form prescribed, No. 9. But previously to his institution, they shall lay before the Bishop the Articles or Constitution of the proposed Chapel, a copy of which, when approved by him, shall be preserved among the documents and papers of the Diocese.

The Bishops shall urge the Vestries in their respective Dioceses to insert in the Constitution of all existing Chapels a clause enforcing the discipline of the Scottish Episcopal Church.

40. *For Establishing and Maintaining a Society in Aid of the Church.*

Whereas, in the primitive Church, and by Apostolic order, Collections were made for the poorer brethren, and for the propagation of the Gospel, it is hereby decreed that a similar practice shall be observed in the Scottish Episcopal Church. Nor ought the poverty of the Church, nor of any portion of it, to be pleaded as an objection, seeing that the Divine commendation is given equally to those who, from their poverty, give a little with cheerfulness, and to those who give largely of their abundance. For this purpose a So-

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ciety, called "The Scottish Episcopal Church Society," shall be formed, the objects of which shall be, 1st, To provide a fund for aged or infirm Clergymen, or salaries for their Assistants, and general aid for congregations struggling with pecuniary difficulties; 2dly, To assist candidates for the ministry in completing their theological studies; 3dly, To provide Episcopal schoolmasters, books, and tracts, for the poor; 4thly, To assist in the formation or enlargement of diocesan libraries. To promote these important purposes a certain day shall be fixed upon annually by every Diocesan Synod, when a Collection shall be made in every Chapel throughout the Diocese, and the nature and object of the Society, in reference to the existing wants of the Church, shall be explained to the people.

41. *Declaring what Censure or Spiritual Penalty is to be incurred by a Breach of these Canons.*

If it shall be ascertained, by clear and sufficient evidence, that any Bishop of this Church hath neglected any of the duties, or acted contrary to any of the Regulations prescribed to him by this Code of Canons, he shall be censured or dealt with by the other Bishops as they may reasonably judge that his neglect or transgression requires. And in all cases of complaint, whether they regard Bishop, Presbyter, or Deacon, the sentence of the Bishops, that is, of the whole, or of the majority of their number, shall be final and conclusive.

All Laws must have an obligatory sanction; and in respect of these Canons or Rules, the Love of Christ will point to that sanction, and will produce a ready observance of whatever the authority which He hath given to His Church shall duly and regularly enjoin, for the honour and glory of His name.

But, as in all societies, ecclesiastical as well as civil, there will always be some individuals whose conduct is not so much guided as it ought to be by the love of Christ, and as it is chiefly for the direction of such persons that Canons and Laws are enacted, it is hereby decreed, that if any Clergyman, whether Bishop, Presbyter, or Deacon, shall disobey any of the above Canons, he shall, after the first and second admonition by his proper judge, be rejected, and publicly declared to be no longer a Clergyman of the Episcopal Church in Scotland. But afterwards, on giving sufficient evidence of a sincere repentance, he may be restored to his former station by the sentence of a majority of the Bishops.

FORMS.

No. 1.—*Deed of Election of the Primus.*

We, the Bishops (*or the majority of the Bishops*) of the Episcopal Church in Scotland, being assembled, under the protection of the Almighty, at —, for the purpose of electing one of our number to fill the office of Primus of our Episcopal College, in the room of our Right Reverend Brother, —, Bishop of —, the late Primus, in conformity with the Second Canon of this Church, do hereby nominate and elect our Right Reverend Brother, —, Bishop of —, to be the Primus, with the privileges attached to that Office, under the restrictions imposed by the said Canon; and we pray that our said Right Reverend Brother may be enabled to perform the duties of the Office, by our Election now duly committed to him, to the glory of God and the good of His Church. In witness whereof we do hereby subscribe these presents at —, on this — day of —, in the year of our Lord —.

No. 2.—*Form of a Mandate for the Election of a Bishop.*

Whereas it hath pleased Almighty God, in His infinite wisdom and goodness, to take unto Himself the Soul of our dear Brother, the Right Reverend N., your late Ordinary and Diocesan, and thereby to deprive the Church in

Scotland of an able and upright Governor, and You of a vigilant Pastor and Overseer, We, the Primus in our own name, and with the sanction of our Colleagues, the surviving Bishops and Pastors of the said Church, on whom the government of the Diocese of M. hath in the meantime devolved, do hereby authorize and command you, the Presbyters of the said Diocese, to repair, within the space of thirty days from the date hereof, to such a place within the Diocese as shall be most convenient for yourselves, and then and there, between the hours of eight in the morning and four in the afternoon, to elect for your Bishop and Pastor a man of blameless conduct, orthodox in the faith, apt to teach, fit to govern, and having a good report as well of those without as those within the pale of the Church.

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In the meantime we exhort you, individually and collectively, to consider well the sacred nature of the trust which we now commit to you, and the importance of the election which you are to make; and having the fear of God and the peace of the Church perpetually in your view, to divest yourselves of all partiality and prejudice arising from personal attachment or enmity to any individual, remembering that your choice will necessarily affect the interests not of the Diocese of M. only, but also of the whole Church in Scotland. *Episcopatus unus est, cujus a singulis in solidum pars tenetur*, is a proposition venerable not merely for its antiquity and its author, but because on its truth rests the possibility of exercising any discipline in the Church Catholic.

You are to have in view, therefore, not only the peace and good government of the Diocese of M., with which you are most intimately connected, but likewise the peace and harmony and good government of the whole Church of God which is in Scotland, under the government of the College of Bishops. It is for securing the former of these objects that, when a Diocese becomes vacant, the Presbyters of the said Diocese have the privilege of making the first choice, and presenting the person elected to the Bishops for consecration; and it is for securing the latter, which is at least of equal importance, that the Bishops reserve to themselves the right of confirming or setting aside the election of the Presbyters.

While we have no wish to encroach on your rights, we must in duty maintain our own; and therefore we earnestly entreat you to make choice of some godly and well-learned man, whose dispositions are reasonably believed to be such as will induce him to co-operate with his colleagues in all things proper, and whose humility, there is reason to hope, will, through Divine Grace, keep him from aspiring to a superiority over any of them, and from falling into that condemnation which the Apostle so much dreads in every novice.

Earnestly praying God to direct you by his Holy Spirit in all things, and in the discharge of this most important duty in particular, We are, &c.

No. 3.—*Declaration to be Signed by the Presbyters at the Election of a Bishop.*

At —, this — day of —, in the year of our Lord —, We, the Presbyters of the Diocese of —, having, [*day and date as above specified*], in obedience to the mandate of the Right Reverend the Primus and provincial Bishops of the Episcopal Church in Scotland, met together at —, for the purpose of electing a Bishop to superintend the Diocese now vacant by the demise [*or translation*] of the Right Reverend —, the late Ordinary, did make choice of and elect to that sacred office —, whom we now humbly and respectfully present to the Primus and his venerable colleagues for consecration [*or collation*] as our future Diocesan; at the same time solemnly declaring that each individual Elector hath, for himself, most conscientiously exercised his best judgment for the ultimate good, increase, and prosperity of the Church.

No. 4.—*Form of Letters Testimonial for Holy Orders to be subscribed by two or more Episcopal Clergymen.*

Whereas our well-beloved in Christ — hath declared to us his intention

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of offering himself a candidate for the sacred office of a Deacon, [or Priest,] and for that end hath requested of us letters testimonial of his learning and good behaviour; We, therefore, whose names are hereunto subscribed, do testify, that the said —, having been personally known to us for the space of three years last past, hath, during that time, lived piously, soberly, and honestly, and diligently applied himself to his studies; nor has he at any time (as far as we know or have heard) maintained or written any thing contrary to the doctrine or discipline of the Episcopal Church in Scotland. And, moreover, we think him a person worthy to be admitted to the sacred Order of Deacons, [or, In witness whereof we have, &c.

*To be addressed to the Bishop by whom
the candidate is to be ordained.]*

No. 5.—*Form of SI QUIS, to be read from the Desk after Morning Prayers, on some Sunday at least two weeks before the day appointed for the Ordination.*

Whereas N. B., a member of this congregation, hath applied to A. B., Bishop of N., to be admitted into Deacon's Orders, and the Bishop hath appointed — day of — for that purpose; this is to give notice, that if you or any of you know any just cause why the said N. B. should not be ordained, you are hereby requested and required to declare the same to me, within a week from this date, or to the Bishop aforesaid at his residence, one week at least before the day fixed for the ordination.

Form of Certificate that the SI QUIS has been read.

We do hereby certify that the above notice was publicly read by the undersigned C. D. in the Chapel of —, in the County of —, during Divine Service, on Sunday, the — day of —, and that no impediment was offered.

Witness our hands, C. D., *Minister.*
E. F., *Vestryman.*

No. 6.—*Form of Letters Dimissory, for Ordination.*

Whereas our well-beloved in Christ, A. B., [Bachelor, or Master of Arts,] hath offered himself to us, —, Bishop of —, as a candidate for ordination and admission into the Holy Order of [Deacons or Priests], and hath produced the requisite testimonials, and hath declared his readiness to make the subscriptions required by the Canons of this Church; and hath, moreover, been examined touching his knowledge of Holy Scripture and general learning by us, and —, Presbyters appointed by us, and hath been found sufficiently qualified for the Holy Office of [a Deacon or Priest]; We, the Bishop aforesaid, being prevented by sundry weighty causes from holding an Ordination at this present time, and knowing that our Right Reverend Brother, —, Bishop of —, is about to hold an Ordination, do, by these presents, grant our Letters Dimissory, commending the said A. B. to our said Right Reverend Brother, and earnestly requesting him to admit the said A. B. into the Holy Order [of Deacons or Priests] in our stead. In witness whereof we have subscribed these presents at —, on this — day of —, in the year of our Lord —, and in the — year of our consecration.

No. 7.—*Form of Subscription to the Thirty-Nine Articles of Religion.*

I, —, do willingly, and *ex animo*, subscribe to the Book of Articles of Religion agreed upon by the Archbishops and Bishops of both Provinces of the Realm of England, and the whole Clergy thereof, in the Convocation holden at London in the year of our Lord one thousand five hundred and sixty-two; and I do acknowledge all and every the Articles therein contained, being in number Thirty-Nine, besides the Ratification, to be agreeable to the Word of God.

No. 8.—*Form of Subscription, promising Obedience to the Canons.*

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I, —, do hereby solemnly promise, that I will give all due obedience to the Canons of the Episcopal Church in Scotland, drawn up and enacted by the Bishops and Clergy of that Church, in a Synod holden for that purpose at Edinburgh, in the year of our Lord one thousand eight hundred and thirty-eight; and I, in like manner, promise that I will show, in all things, an earnest desire to promote the peace, unity, and order, of the said Episcopal Church, and will not appeal from any sentence to a Civil Court, but acquiesce in the Decisions of the Ecclesiastical Authorities, in all questions falling under their spiritual jurisdiction.

No. 9.—*Form of a Deed of Presentation to a Pastoral Charge.*

To the Right Reverend Father in God, —, by Divine permission Bishop of —.

We, —, [Church Wardens, Vestrymen, Managers, Proprietors, or Directors,] in our own names, and in name of the Episcopal Congregation assembling for the Public Worship of God at the Chapel in —, do hereby present to your Reverence, for the purpose of his being admitted to the Pastoral charge of the said Congregation, the Reverend —, under promise of faithfully fulfilling, on our part, the conditions agreed upon betwixt him and us, for the due support of his Ministerial character. In testimony whereof we have subscribed these presents at —, the — day of —, in the year of our Lord —.

No. 10.—*Form of Testimonial for Institution to a Pastoral Charge, to be subscribed by two or more Episcopal Clergymen.*

We, whose names are hereunto subscribed, do testify and make known, that the Reverend —, having been personally known to us for the space of three years last past, hath, during that time, lived piously, soberly, and honestly; nor hath he at any time (as far as we know or believe) held, written, or taught any thing contrary to the Doctrine or Discipline, or that may hinder his usefulness in the Ministry of the Episcopal Church in Scotland. In testimony whereof we have subscribed these presents at —, this — day of —, in the year of our Lord —.

[To be addressed to the Bishop by whom
Institution is to be granted.]

No. 11.—*Form of Institution to a Pastoral Charge.*

By the tenor of these presents, We, — Bishop —, do make it known unto all whom it may concern, that a Presentation, bearing date the — day of —, in the year of our Lord —, by — [Church Wardens, Vestrymen, Managers, Proprietors, or Directors], in their own names, and in the name of the Episcopal Congregation assembling for the Public Worship of God at the Chapel in —, in favour of our well-beloved in Christ, the Reverend —, having been offered to Us for the purpose of his being admitted to the Pastoral Charge of the said Congregation, We, the Bishop before mentioned, have sustained the same, and do hereby institute and appoint the said Reverend — to be Pastor or Minister of the said Congregation, he having previously made in our presence the subscriptions required by the Canons of the Episcopal Church in Scotland, and likewise exhibited to Us his Letters of Holy Orders; and we do further license and authorize the said Reverend — to read in the said Chapel, or in any other Chapel that may be consecrated or licensed by us or our successors in office, for the use of the said congregation, the Public Prayers of the Church, to administer God's Holy Sacraments, to preach His Holy Word, and to perform, according to the rites and ceremonies of the Episcopal Church in Scotland, every other sacred office which it is competent for a Presbyter to perform; and we do hereby strictly prohibit and discharge every other Clergyman from performing any sacred office in the said Chapel, or from interfering, directly or indirectly, in the pastoral care of the said congregation, without the consent and approba-

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tion of the said Reverend —; whom We do also certify that he shall be accountable to us, and our successors, Bishops of —, for his conduct as Minister of the Chapel to which he is now instituted, and as Pastor of the Congregation which is now committed to his care; and that for this purpose he shall attend our visitations when required so to do either by ourselves or by the Dean in our name, and answer all such questions as We may find it expedient to put to him, respecting the state of his Congregation, and his mode of instructing them; submitting, if We shall require it, his Sermons and public Lectures of every kind to our inspection; and We do hereby exhort and beseech those who are now committed to his Pastoral care to listen, as becometh Christians, to his Instructions and Godly Admonitions, as well private as public, and to esteem him very highly in love for his work's sake: And We do earnestly pray that he may have much satisfaction in his holy function, and meet with the respect and attention which are due to that function during the whole time of his Ministry in the said Congregation. In testimony whereof We have subscribed these presents at —, on the — day of —, in the year of our Lord —, and in the — year of our consecration.

No. 12.—*Form for Appointing a Dean.*

We, A. B., by Divine permission Bishop of D., do, by these presents, constitute and appoint the Reverend C. D., Dean of the Diocese of D., in the room of the Reverend E. F., late Dean, with power of convocating the Clergy of the said Diocese, and presiding at their meetings in our absence, and of performing such other acts as belong to the office of Dean, according to the Canons of this Church. In witness whereof we have subscribed these presents this — day of —, in the year of our Lord —, and in the — year of our consecration.

No. 13.—*Form of Licence to a Deacon or Priest.*

The Reverend A. B. having this day appeared before us, exhibited his Letters of Orders, Testimonials, and Title, and having, moreover, in our presence subscribed the Thirty-Nine Articles and Code of Canons of this Church, is hereby Licensed to perform all the Duties competent to his Order in the Congregation of —, in our Diocese. In testimony whereof We have subscribed these presents at —, this — day of —, in the year of our Lord —.

The Committee for superintending the printing of the Canons, appointed by the General Synod on the 5th September, 1838, hereby certify, that the preceding Canons, amounting in number to forty-one, along with the Forms, amounting in number to thirteen, have been compared by them with the Copy authenticated by the said Synod, and that they are in every respect the same.

MICHAEL RUSSELL, LL.D., Bishop, Clerk to the Episcopal College.

C. H. TERROT, A.M., Dean of Edinburgh.

E. B. RAMSAY, A.M., Minister of St. John's Chapel, Delegate of Edinburgh.

J. W. FERGUSON, A.M., Minister of St. Peter's Chapel, Edinburgh, and Clerk to the Chamber of Deans and Delegates.

APPENDIX III.

Church-Building Acts.

MANY of the principal Provisions in these discordant and voluminous Statutes have been given under different Titles in this Work, under which they would be naturally classed, *e. g.* "Chapels," "Church-Rate," &c. But it had been the intention of the Editor to print in this place an Analysis of these Acts arranged according to their subject-matter. Two circumstances have happened since the intention was announced (*a*) in an early part of this Work, which have rendered its execution unnecessary; one is the fact that a single Church-Building Act, consolidating all the former Enactments, is now in preparation to be laid before Parliament; and the other circumstance is, that the purpose of the Editor has been, during the progress of this Work, forestalled by Mr. Law, the Principal Surrogate of the Diocesan Court of Lichfield, who has very recently published "The Acts for Building and Promoting the Building of Additional Churches in Populous Parishes. Arranged and Harmonized, for the Use of the Clergy of the Diocese of Bath and Wells."

(*a*) See titles **Chapel** and **Church-Building Acts**.

APPENDIX IV.

Ecclesiastical Commissioners for England and Wales.

Form of First Commission to inquire into the State of the Established Church, with reference to Ecclesiastical Duties and Revenues.

WILLIAM the Fourth, by the Grace of God of the United Kingdom of Great Britain and Ireland King, Defender of the Faith: To the Most Reverend Father in God Our right trusty and entirely-beloved Councillor William Archbishop of Canterbury, Our right trusty and well-beloved Councillor John Singleton Lord Lyndhurst Our Chancellor of Great Britain, the Most Reverend Father in God Our right trusty and entirely-beloved Councillor Edward Archbishop of York, Our right trusty and right well-beloved Cousin and Councillor Dudley Earl of Harrowby, the Right Reverend Father in God Our right trusty and well-beloved Councillors Charles James Bishop of London, the Right Reverend Fathers in God John Bishop of Lincoln and James Henry Bishop of Gloucester, and Our right trusty and well-beloved Councillors Sir Robert Peel Baronet, Henry Goulburn, Charles Watkin Williams Wynn, Henry Hobhouse, and Sir Herbert Jenner Knight, Greeting. Whereas We have thought it expedient, that the fullest and most attentive Consideration should be forthwith given to the State of the several Dioceses in England and Wales, with reference to the Amount of their Revenues, and the more equal Distribution of Episcopal Duties, and to the Prevention of the Necessity of attaching by Commendam to Bishopricks Benefices with Cure of Souls; that the State of the several Cathedral and Collegiate Churches in England and Wales should be also taken into Consideration, with a View to the Suggestion of such Measures as may render them most conducive to the Efficiency of the Established Church; and that the best Mode shall be devised of providing for the Cure of Souls, with a special reference to the Residence of the Clergy on their respective Benefices. Know ye, that We, reposing great Trust and Confidence in your Zeal, Ability, and Discretion, have authorized and appointed, and do by these Presents authorize and appoint, you the said William Archbishop of Canterbury, John Singleton Lord Lyndhurst, Edward Archbishop of York, Dudley Earl of Harrowby, Charles James Bishop of London, John Bishop of Lincoln, James Henry Bishop of Gloucester, Sir Robert Peel, Henry Goulburn, Charles Watkin Williams Wynn, Henry Hobhouse, and Sir Herbert Jenner, or any Three or more of you, to consider the State of the several Dioceses in England and Wales, with reference to the Amount of their Revenues, and the more equal Distribution of Episcopal Duties, and the Prevention of the Necessity of attaching by Commendam to Bishopricks Benefices with Cure of Souls: And We do hereby authorize and

appoint you to consider also the State of the several Cathedral and Collegiate Churches in England and Wales, with a view to the Suggestion of such Measures as may render them conducive to the Efficiency of the Established Church; and to devise the best Mode of providing for the Cure of Souls, with special reference to the Residence of the Clergy on their respective Benefices: And for the better enabling you to fulfil the Objects of this Our Commission, We do by these Presents give and grant to you, or any Three or more of you, full Power and Authority to call before you, or any Three or more of you, such Persons as you shall judge necessary, by whom you may be the better informed on the Subjects herein submitted for your Consideration: And We do hereby give and grant unto you, or any Three or more of you, full Power and Authority, when the same shall appear to be requisite, to administer an Oath or Oaths to any Person or Persons whatsoever to be examined before you, or any Three or more of you, touching or concerning the Premises: And we do also give and grant unto you, or any Three or more of you, full Power and Authority to cause all and singular the Officers, Clerks, Ministers, and others, attached to or connected with the said Cathedral and Collegiate Churches, and with any Ecclesiastical Benefices, having in their Custody any Rolls, Records, Order Books, Papers, or other Writings relating thereto, to bring and produce the same upon Oath before you, or any Three or more of you: And Our further Will and Pleasure is, that you, or any Three or more of you, do and shall, with all convenient Speed, report to Us, under your Hands and Seals respectively, your Opinions as to what Measures it would be expedient to adopt on the several Points herein submitted for your Consideration. And We further will and command, and by these Presents ordain, that this our Commission shall continue in full force and virtue, and that you Our Commissioners, or any Three or more of you, shall and may, from Time to Time, proceed in the Execution thereof, and of every Matter and Thing therein contained, although the same be not continued from Time to Time by Adjournment. And We do hereby command all and singular Our Justices of the Peace, Sheriffs, Mayors, Bailiffs, Constables, Officers, Ministers, and all other Our loving Subjects whatsoever, as well within Liberties as without, that they be assistant to you and each of you in the Execution of these Presents. And for your Assistance in the due Execution of this Our Commission, do further give you Power and Authority to appoint any fit and proper Person to be Secretary to this Our Commission, and to attend you, whose Services and Assistance We require you to use from Time to Time, as Occasion shall render necessary. In witness whereof We have caused these Our Letters to be made Patent. Witness Ourselves at Westminster, the Fourth day of February, in the Fifth Year of Our Reign.

By Writ of Privy Seal.

EDMUNDS.

Form of Renewed Commission to Inquire into the State of the Established Church, with reference to Ecclesiastical Duties and Revenues.

WILLIAM the Fourth, by the Grace of God of the United Kingdom of Great Britain and Ireland King, Defender of the Faith: To the Most Reverend Father in God Our right trusty and entirely-beloved Councillor William Archbishop of Canterbury, Our right trusty and well-beloved Councillor Sir Charles Christopher Pepys, Knight, One of the Commissioners for the Custody of Our Great Seal of Our said United Kingdom, the Most Reverend Father in God Our right trusty and entirely-beloved Councillor Edward Archbishop of York, Our right trusty and entirely-beloved Cousin and Councillor Henry Marquis of Lansdowne, Our right trusty and well-beloved Cousin and Councillor Dudley Earl of Harrowby, Our right trusty and well-beloved Cousin and Councillor William Viscount Melbourne, Our right trusty and

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well-beloved Councillor John Russell (commonly called Lord John Russell), the Right Reverend Father in God Our right trusty and well-beloved Councillor Charles James Bishop of London, the Right Reverend Fathers in God John Bishop of Lincoln and James Henry Bishop of Gloucester, and Our right trusty and well-beloved Councillors Thomas Spring Rice, Henry Hobhouse, and Sir Herbert Jenner, Knight, Greeting. Whereas We did, by Our Letters Patent bearing Date the Fourth Day of February in the Fifth Year of Our Reign, appoint you the said William Archbishop of Canterbury, Edward Archbishop of York, Dudley Earl of Harrowby, Charles James Bishop of London, John Bishop of Lincoln, James Henry Bishop of Gloucester, Henry Hobhouse, and Sir Herbert Jenner, together with Our right trusty and well-beloved Councillors John Singleton Lord Lyndhurst, Sir Robert Peel, Baronet, Henry Goulburn, and Charles Watkin Williams Wynne, or any Three or more of you or them, to be Our Commissioners for considering the State of the several Dioceses in England and Wales, with reference to the Amount of their Revenues, and the more equal Distribution of Episcopal Duties, and the Prevention of the Necessity of attaching by Commendam to Bishopricks Benefices with the Cure of Souls, and also for considering the State of the several Cathedral and Collegiate Churches in England and Wales, with a view to the Suggestion of such Measures as may render them most conducive to the Efficiency of the Established Church; and for devising the best Mode of providing for the Cure of Souls, with special Reference to the Residence of the Clergy on their respective Benefices. Now know ye, that We have revoked and determined, and by these Presents do revoke and determine, the said recited Letters Patent, and every Article, Clause, and Thing therein contained: And further, Know ye, that We, reposing great Trust and confidence in your Zeal, Ability, and Discretion, have authorized and appointed, and do by these Presents authorize and appoint, you the said William Archbishop of Canterbury, Sir Charles Christopher Pepys, Edward Archbishop of York, Henry Marquis of Lansdowne, Dudley Earl of Harrowby, William Viscount Melbourne, John Russell (commonly called Lord John Russell), Charles James Bishop of London, John Bishop of Lincoln, James Henry Bishop of Gloucester, Thomas Spring Rice, Henry Hobhouse, and Sir Herbert Jenner, or any Three or more of you, to consider the State of the several Dioceses in England and Wales, with reference to the Amount of their Revenues, and the more equal Distribution of Episcopal Duties, and the Prevention of the Necessity of attaching by Commendam to Bishopricks Benefices with Cure of Souls: And We do hereby authorize and appoint you to consider also the State of the several Cathedral and Collegiate Churches in England and Wales, with a view to the Suggestion of such Measures as may render them conducive to the Efficiency of the Established Church; and to devise the best mode of providing for the Cure of Souls, with special Reference to the Residence of the Clergy on their respective Benefices: And for the better enabling you to fulfil the Objects of this Our Commission, We do by these Presents give and grant to you, or any Three or more of you, full Power and Authority to call before you, or any Three or more of you, such Persons as you shall judge necessary, by whom you may be the better informed on the Subjects herein submitted for your Consideration: And We do hereby give and grant unto you, or any Three or more of you, full Power and Authority, when the same shall appear to be requisite, to administer an Oath or Oaths to any Person or Persons whatsoever to be examined before you, or any Three or more of you, touching or concerning the Premises: And We do also give and grant unto you, or any Three or more of you, full Power and Authority to cause all and singular the Officers, Clerks, Ministers, and others attached to or connected with the said Cathedral and Collegiate Churches, and with any Ecclesiastical Benefices, having in their Custody any Rolls, Records, Orders, Books, Papers, or other Writings relating thereto, to bring and produce the same upon Oath before you, or any Three or more of you. And Our further Will and Pleasure is, that you, or any Three or more of you, do and shall, with all convenient Speed, report to Us, under your Hands and

Seals respectively, your Opinions as to what Measures it would be expedient to adopt on the several Points herein submitted for your Consideration. And We further will and command, and by these Presents ordain, that this Our Commission shall continue in full force and virtue; and that you Our Commissioners, or any Three or more of you, shall and may from Time to Time proceed in the Execution thereof, and of every Matter and Thing therein contained, although the same be not continued from Time to Time by Adjournment. And we do hereby command all and singular Our Justices of the Peace, Sheriffs, Mayors, Bailiffs, Constables, Officers, Ministers, and all others Our loving Subjects whatsoever, as well within Liberties as without, that they be assistant to you and each you in the Execution of these Presents. And for your Assistance in the due Execution of this Our Commission, do further give you Power and Authority to appoint any fit and proper Person to be Secretary to this Our Commission, and to attend you, whose Services and Assistance We require you to use from Time to Time, as Occasion shall render necessary. In witness whereof We have caused these Our Letters to be made Patent. Witness Ourselves at Westminster, the Sixth day of June, in the Fifth Year of our Reign.

Ecclesiastical
Commissions
for England
and Wales.

By the King Himself,
EDMUNDS.

ACTS RELATING TO THE ECCLESIASTICAL COMMISSIONERS FOR ENGLAND AND WALES.

6 & 7 WILL. 4, c. 77.

An Act for carrying into effect the Reports of the Commissioners appointed to consider the State of the Established Church in England and Wales, with reference to Ecclesiastical Duties and Revenues, so far as they relate to Episcopal Dioceses, Revenues, and Patronage. [13th August, 1836.]

Sect. 1 (a). "That the Lord Archbishop of Canterbury for the time being, the Lord Archbishop of York and the Lord Bishop of London for the time being, John Lord Bishop of Lincoln, James Henry Lord Bishop of Gloucester, the Lord High Chancellor of Great Britain, the Lord President of the Council, the Lord High Treasurer or the First Lord of the Treasury, and the Chancellor of the Exchequer, for the time being respectively, and such one of His Majesty's Principal Secretaries of State as shall be for that purpose nominated by His Majesty under his royal sign manual, (such Lord Chancellor, Lord President, Lord High Treasurer or First Lord of the Treasury, Chancellor of the Exchequer, and Secretary of State being respectively members of the United Church of Great Britain and Ireland,) the Right Honourable Dudley Earl of Harrowby, the Right Honourable Henry Hobhouse, and the Right Honourable Sir Herbert Jenner, Knight, shall for the purposes of this act be one body politic and corporate by the name of 'The Ecclesiastical Commissioners for England,' and by that name shall have perpetual succession and a common seal, and by that name shall and may sue and be sued, and shall have power and authority to take and purchase and hold lands, tenements, and hereditaments, to them, their successors and assigns, for the purposes of this act, the statutes of mortmain, or any other act or acts to the contrary hereof notwithstanding."

Commission-
ers incor-
porated.

Sect. 2. "That the two last-named bishops and the three last-named lay commissioners shall be at all times removeable by his majesty in council by warrant under the sign manual; and that when any vacancy shall occur, by death, removal, resignation, or otherwise, among the two last-named bishops

How Vacan-
cies to be
supplied.

(a) For the preamble to this act see title *Bishop*, vol. i. 195 a.

and the three last-named lay commissioners, or among such of the future commissioners under this act as shall not have become such commissioners by virtue of any dignity or office, according to the provisions of this act, it shall be lawful for his majesty to fill up such vacancy by appointing under his royal sign manual, instead of any such commissioner being a bishop some other bishop of England or Wales, and instead of any such commissioner being a layman some other layman, being a member of the said church, to be a commissioner under this act; and every such bishop or person so to be appointed shall accordingly become to all intents and purposes one of the commissioners for the purposes of this act."

Commissioners to subscribe a Declaration.

Sect. 3. "That every such commissioner, whether herein named or hereafter to be appointed, not being an archbishop or bishop, shall, before acting under the said commission, and at the first meeting he shall attend, subscribe in the book of the minutes of the proceedings of the said commissioners a declaration in the words following :

'I do hereby solemnly, and in the presence of God, testify and declare, that I am a member of the United Church of England and Ireland as by law established. Witness my hand this — day of —.'"

Five Commissioners to form a Quorum.

Sect. 4. "That all acts, matters, and things which the said commissioners are by any of the provisions of this act authorized or required to do and perform shall and may be done and performed by any five of such commissioners: Provided always, that such five commissioners be for such purpose assembled at a meeting whereof due notice shall have been given to all the said commissioners.

Assent of Meeting of Episcopal Commissioners essential to Acts under Seal, &c.

Sect. 5. "Provided always, that no proceeding which requires to be ratified and confirmed by the common seal of the corporation shall be finally concluded, nor the said seal affixed to any deed or instrument, save at a meeting whereof notice shall have been in like manner given, and where two at least of the said episcopal commissioners shall be personally present: Provided also, that in case any two episcopal commissioners, being the only episcopal commissioners present, shall object to the ratification and confirmation of any such proceeding as aforesaid, or to the affixing of such seal to any deed or instrument as aforesaid, such ratification or affixing of the seal shall not take place until a subsequent meeting of the commissioners shall have been held, after due notice thereof shall have been given."

Who to be Chairman.

Sect. 6. "That at each meeting of the said commissioners the commissioner first in rank and precedence there present shall preside as chairman, and in case of the equality in rank and precedence of all the commissioners so present then the senior commissioner in the order of appointment shall so preside; and the chairman at all such meetings shall not only vote as a commissioner, but shall also in case of the equality of votes have the casting or decisive vote."

Commissioners to appoint a Treasurer, Secretary, and other Officers.

Sect. 7. "That the said commissioners may from time to time appoint a treasurer and secretary, and such clerks, messengers, and officers as they shall deem necessary, and from time to time, at the discretion of the said commissioners, may remove such treasurer, secretary, clerks, messengers, and officers, or any of them, and appoint others in their stead: Provided always, that the amount of the salaries of such treasurer, secretary, clerks, messengers, and officers shall from time to time be regulated by the lord high treasurer, or the lords commissioners of his majesty's treasury, or any three or more of them."

Secretary to make and keep Minutes.

Sect. 8. "That the secretary or other officer of the said commissioners shall keep a book, in which he shall make minutes of the proceedings of the said commissioners at their several meetings, and enter the names of the commissioners present thereat; and such entry of the proceedings at each meeting shall be signed by the chairman thereof."

Commissioners may call and examine Witnesses,

Sect. 9. "That it shall be lawful for the said commissioners, by summons under the hand of the chairman of any such meeting, to require the attendance of any person whom they shall think fit to examine touching any matter

within their cognizance, also to make any inquiries, and call for any answers or returns, as to any such matter, and also to administer oaths, and examine every such person upon oath, and to cause to be produced before them, upon oath, all statutes, charters, grants, rules, regulations, bye laws, books, deeds, contracts, agreements, accounts, and writings whatsoever, or copies thereof respectively, in anywise relating to any such matter; or, in lieu of requiring such oath as aforesaid, the said commissioners may, if they think fit, require any such person to make and subscribe a declaration of the truth of his examination."

&c. and administer an Oath or a Declaration.

Sect. 10. "That the said commissioners shall from time to time prepare, and lay before his majesty in council, such schemes as shall appear to the said commissioners to be best adapted for carrying into effect the hereinbefore recited recommendations, and shall in such schemes recommend and propose such measures as may, upon further inquiry, which the said commissioners are hereby authorized to make, appear to them to be necessary for carrying such recommendations into full and perfect effect: Provided always, that nothing herein contained shall be construed to prevent the said commissioners from proposing in any such scheme such modifications or variations as to matters of detail and regulation as shall not be substantially repugnant to any or either of the said recommendations, and in particular that it shall be competent to the said commissioners to propose in any such scheme that all parishes, churches, or chapelries which are locally situate in any diocese, but subject to any peculiar jurisdiction other than the jurisdiction of the bishop of the diocese in which the same are locally situate, shall be only subject to the jurisdiction of the bishop of the diocese within which such parishes, churches, or chapelries are locally situate."

Commissioners to lay Schemes before the King in Council for carrying into effect their Recommendations.

Sect. 11. "That the said commissioners shall prepare, and lay before his majesty in council, such scheme as shall appear to the said commissioners to be best adapted for preventing the appointment of any clergyman not fully conversant with the Welsh language to any benefice with cure of souls in Wales in any parish the majority of the inhabitants of which do not understand the English language."

For preventing Appointment of Clergymen in Wales not acquainted with the Welsh Language.

Sect. 12. "That when any scheme prepared under the authority of this act shall be approved by his majesty in council it shall be lawful for his majesty in council to issue an order or orders ratifying the same, and specifying the time or times when such scheme or the several parts thereof shall take effect, and to direct in every such order that the same be registered by the registrar of each of the dioceses the bishops whereof may or shall be in any respect affected thereby, and in any newly-created diocese by such person as shall be for that purpose named in such order, which person shall in such last-mentioned diocese become registrar there, and so continue as long as he shall demean himself well in his office."

King in Council may make Orders for carrying Schemes into effect; which shall be registered in each Diocese respectively;

Sect. 13. "That every such order shall, as soon as may be after the making and issuing thereof by his majesty in council, be inserted and published in the London Gazette."

and gazetted;

Sect. 14. "That so soon as any such order in council shall be so registered and gazetted it shall in all respects, and as to all things therein contained, have and be of the same force and effect as if all and every part thereof were included in this act, any law, statute, canon, letters patent, grant, usage, or custom to the contrary notwithstanding."

and then to be of full Effect for all Purposes and as to all Persons.

Sect. 15. "That a copy of every order of his majesty in council made under this act shall be laid before each house of parliament in the month of January in every year, if parliament shall be then sitting, or if parliament be not then sitting within one week after the next meeting thereof."

Copies of Orders to be laid before Parliament.

Sect. 16. "That the registrar of every diocese to whom any order of his majesty in council made by virtue of this act shall be delivered shall forthwith register the same in the registry of his diocese; and the persons who shall be for that purpose appointed in the dioceses of Manchester and Ripon shall forthwith register every such order in books to be by them for that purpose provided, which shall thenceforth become the registry of those dioceses

Registrars to register all Orders, subject to a Penalty for Neglect.

respectively ; and if any such registrar or other person shall refuse or neglect to register any such order he shall for every day during which he shall so offend forfeit twenty pounds, and if his offence shall continue for the space of three months he shall forfeit his office, and it shall be lawful for the bishop of the diocese, or for his majesty, as the case may be, to appoint a successor thereto."

Fee to Registrar.

Sect. 17. "That for such registration as aforesaid no registrar shall be entitled to receive any fee or reward, but that on every search for any such order he shall be entitled to receive a fee of three shillings, and for every copy or extract of any such order certified by him he shall be entitled to receive for every folio of ninety words four-pence ; and the copy of every such entry, certified by the registrar, shall be admissible as evidence in all courts and places whatsoever."

No Commendams to be held by Bishops.

Sect. 18. "That after the passing of this act no ecclesiastical dignity, office, or benefice shall be held in commendam by any bishop, unless he shall so hold the same at the time of passing thereof ; and that every commendam thereafter granted, whether to retain or to receive, and whether temporary or perpetual, shall be absolutely void, to all intents and purposes."

Jurisdiction of Archdeacons.

Sect. 19. "That all archdeacons throughout England and Wales shall have and exercise full and equal jurisdiction within their respective archdeaconries, any usage to the contrary notwithstanding."

This Act not to affect the Jurisdiction of the Ecclesiastical Courts for One Year.

Sect. 20. "And whereas it may be expedient to consider the state and jurisdiction of all the ecclesiastical courts in England and Wales ; be it enacted, that nothing herein contained, nor any order of his majesty in council made under the authority of this act, either for altering the limits of either of the existing provinces or the boundaries of any existing diocese or archdeaconry, or for uniting any existing sees, or for creating any new bishoprick or archdeaconry, or for appointing any registrar under the provisions of this act, or for any other purpose whatever, shall for one year after the passing of this act, or if parliament shall be then sitting till the end of the session of parliament, in any manner affect or be construed to affect the jurisdiction, power, or authority of any or either of the existing ecclesiastical courts in England or Wales, or the extent or limits thereof, but that during such period as last aforesaid every such court shall continue in all matters whatsoever arising within its present limits to exercise the same jurisdiction as heretofore by law allowed."

Monitions to reside and for Payment of Stipends, &c. to issue in Name of the Bishop.

Sect. 21. "That in all cases of monitions to reside, and monitions for the payment of the stipends of curates, and of proceedings consequent thereupon, except as hereinafter excepted, and in all cases of licences granted to spiritual persons, the same shall issue only under the authority and in the name of the bishop of the diocese, whether such diocese be according to the present territorial limits or as altered or newly created under the authority of this act : Provided always, that if it be necessary to institute in any ecclesiastical court proceedings thereupon or in consequence thereof, such proceedings shall be commenced, carried on, and decided in and by the same court which at the time of the passing of this act would be entitled to exercise jurisdiction in such matters respectively, and in the case of proceedings at the instance of a bishop, in the name of the judge of such court : Provided also, that nothing herein contained shall affect any peculiar belonging to either of the archbishops at the time of the passing of this act, but that every such peculiar, except as may be otherwise provided by any order of his majesty in council, made and issued in pursuance of this act, shall to all intents and purposes and in all respects remain subject to the same authority and jurisdiction as if this act had not been passed."

Same Court to have Jurisdiction therein as at present.

Law of *Bona notabilia* not altered for One Year

Sect. 22. "That nothing herein contained, nor any such order in council as aforesaid, shall, during such period as last aforesaid, be construed to alter in any respect whatsoever the law of *Bona notabilia* as it exists at the time of the passing of this act, notwithstanding any change of province, diocese, archdeaconry, or any other jurisdiction whatsoever."

Marriage Licences.

Sect. 23. "That all marriage licences shall during such period as last afore-

said continue to be granted in the same manner and by the same authorities respectively as before the passing of this act."

Sect. 24. "That during such period every ecclesiastical court in which any proceedings shall be had shall have power to send for and enforce the production of all original instruments and documents relating to such proceedings by whatever ecclesiastical authority the same may have been issued."

Ecclesiastical Courts to enforce Production of Documents.

Sect. 25. "That in case the office of judge, registrar, or other officer of any or either of the ecclesiastical courts in England or Wales (except the Prerogative Court of Canterbury) shall become vacant during such period as last aforesaid, the person who may be thereunto appointed shall accept and take such office subject to all regulations and alterations affecting the same which may be hereafter made and provided by or under the authority of parliament, and shall not by his appointment thereto acquire any vested interest in such office, nor any claim or title to compensation in respect thereof, in case the same shall be hereafter abolished by parliament."

Future Appointments to Offices in Ecclesiastical Courts not to give a vested Interest.

Sect. 26. "And whereas by an act passed in the fifth and sixth years of his present majesty, intituled 'An Act to provide for the Regulation of Municipal Corporations in England and Wales,' provision was made concerning the sale of certain ecclesiastical preferments in the patronage of the several municipal corporations therein mentioned, at such time and in such manner as the commissioners appointed to consider the state of the Established Church in England and Wales, with reference to ecclesiastical duties and revenues, should direct; be it enacted, that from and after the passing of this act the provisions in the said recited act contained which apply to the said commissioners shall apply and be held to apply to the commissioners appointed under this act by the style and title of 'The Ecclesiastical Commissioners for England.'"

Provisions applicable to Church Commissioners under Municipal Reform Act to apply to Commissioners under this Act. 5 & 6 Will. 4, c. 76.

3 & 4 VICT. c. 113.

An Act to carry into effect, with certain Modifications, the Fourth Report of the Commissioners of Ecclesiastical Duties and Revenues. [11th August, 1840.]

"Whereas an act was passed in the seventh year of the reign of his late majesty, intituled 'An Act for carrying into effect the Reports of the Commissioners appointed to consider the State of the Established Church in England and Wales with reference to Ecclesiastical Duties and Revenues, so far as they relate to Episcopal Dioceses, Revenues, and Patronage,' constituting the ecclesiastical commissioners for England to be one body politic and corporate for the purposes set forth in the said act: And whereas the commissioners first mentioned in the said act, in their fourth report to his late majesty, bearing date the twenty-fourth day of June, in the year One thousand eight hundred and thirty-six, made certain recommendations touching cathedral and collegiate churches, and other things in the said report specified: And whereas it is expedient that the said recommendations should be adopted, with certain alterations (a)."

6 & 7 Will. 4, c. 77.

Sect. 67. "That, except as herein otherwise specified, all the monies and revenues to be paid to the ecclesiastical commissioners for England, and all the rents and profits of the lands, tithes, and other hereditaments vested and to be vested in them the said commissioners by and under the authority of this act, together with all accumulations of interest produced by and arising therefrom, shall be from time to time carried over by the said commissioners to a common fund, and by payments or investments made out of such fund, or if in any case it be deemed more expedient, by means of an actual conveyance and assignment of such lands, tithes, or other hereditaments, or of a portion thereof, additional provision shall be made, by the authority hereinafter provided, for the cure of souls in parishes where such assistance is most required,

Mode of applying the Revenues at the Disposal of the Commissioners.

(a) See title **Deans and Chapters**, of this statute which are not printed in vol. ii. p. 125 a, for the other sections this place.

in such manner as shall, by the like authority, be deemed most conducive to the efficiency of the Established Church: Provided always, that in making any such additional provision out of any tithes, or any lands or other hereditaments allotted or assigned in lieu of tithes, so vested or to be vested in the said commissioners, or out of the rents and profits thereof, due consideration shall be had of the wants and circumstances of the places in which such tithes now arise or have heretofore arisen."

Appointment
of additional
Commission-
ers.

Sect. 78. "That, in addition to the commissioners named in and appointed or to be appointed by or under the provisions of the first-recited act, the following persons shall be ecclesiastical commissioners and members of the corporation of the ecclesiastical commissioners for England, for all the purposes of the said first-recited act and of this act; that is to say, all the bishops of England and Wales for the time being respectively, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of her majesty's Court of Common Pleas, the Lord Chief Baron of her majesty's Court of Exchequer, the Judge of the Prerogative Court of the Archbishop of Canterbury, the Judge of the High Court of Admiralty for the time being respectively (such chief justices, master of the rolls, chief baron, and judges being respectively members of the united Church of England and Ireland), the Deans of the cathedral churches of Canterbury, and St. Paul in London, and of the collegiate church of St. Peter, Westminster, for the time being respectively; and also four such lay persons (being members of the said united church) as shall be duly appointed by her majesty, and whom her majesty is hereby authorized to appoint, under her royal sign manual, to be such commissioners; and such other two lay persons (being members of the said united church) as shall be duly appointed by the Lord Archbishop of Canterbury for the time being, and whom the said archbishop is hereby authorized to appoint, under his hand and archiepiscopal seal, to be such commissioners."

How Vacan-
cies to be
filled up.

Sect. 79. "That when any vacancy shall occur among such six last mentioned commissioners, by death, resignation, or otherwise, it shall be lawful for her majesty, or for the said archbishop, as the case may be, to fill up such vacancy by the appointment of some other lay person (being a member of the said united church) to be a commissioner; and the person so appointed shall thereupon become and be an ecclesiastical commissioner, and a member of the corporation of the ecclesiastical commissioners for England, for all the purposes of the said first-recited act and of this act."

New Com-
missioners to
subscribe De-
claration.
Commission-
ers not to be
removeable.

Sect. 80. "That every lay commissioner appointed by or under the provisions of this act shall, before acting as such commissioner, subscribe the declaration required of the other lay commissioners by the said first-recited act."

Sect. 81. "That so much of the first-recited act as relates to the removal by her majesty of any commissioner shall be and the same is hereby repealed; and every commissioner appointed or to be appointed by name by or under the provisions of the said first-recited act or of this act, shall hold his appointment as an ecclesiastical commissioner, and shall be a member of the corporation of the ecclesiastical commissioners for England, so long as he shall well demean himself in the execution of his duties as such commissioner."

Notice of
Meetings.

Sect. 82. "That the provisions of the first-recited act, whereby it is required that due notice of every meeting shall be given to every commissioner, shall not be construed to apply to any commissioner who at the time of giving notice of any meeting shall not be within England or Wales, nor to any commissioner who shall have intimated to the secretary that for any specified time (such time including the period of holding any meeting) he the said commissioner will not be able to attend the meetings of the commissioners: Provided always, that no act, matter, or thing affecting any commissioner, being a bishop or dean, or the see or diocese or cathedral or collegiate church of such commissioner, shall be done at any meeting whereof due notice shall not have been given to such commissioner, without his consent in writing previously obtained."

Ecclesiastical
Commission-
ers to lay

Sect. 83. "That the ecclesiastical commissioners for England shall from time to time prepare and lay before her majesty in council such schemes as

shall appear to the said commissioners to be required and to be best adapted or carrying this act into full effect, and shall in such schemes recommend and propose all such measures as may upon further inquiry, which the said commissioners are hereby authorized to make, appear to them to be necessary for that purpose: Provided always, that, previously to laying any such scheme before her majesty in council, notice thereof shall be given to any corporation aggregate or sole affected thereby; and the objections, if any, of such corporation shall be laid before her majesty in council, together with such scheme: Provided also, that nothing herein contained shall be construed to prevent the said commissioners from proposing in any such scheme such modifications or variations as to matters of detail and regulation as shall not be substantially repugnant to any provision of this act or of the said last-mentioned act."

Schemes before Queen in Council, for carrying into effect the said Recommendations.

Sect. 84. "That when any such scheme shall be approved by her majesty in council, it shall be lawful for her majesty in council to make an order or orders ratifying the same, and specifying the time or times when such scheme or the several parts thereof shall take effect, and to direct every such order to be registered by the registrar of each of the dioceses whereof the bishop, or within which any cathedral or collegiate church, dignitary, chapter, member of a chapter, officer, incumbent, or any other person or body corporate, may or shall be in any respect affected thereby."

Queen in Council may make Order for carrying Schemes into effect.

Sect. 85. "That in any order made by her majesty in council under the authority of this act or of the first-recited act, it shall be sufficient to refer to the act under the authority whereof the order is made, and it shall not be necessary to recite any of the provisions of this act or of the said first-recited act."

Orders need only refer to Act.

Sect. 86. "That every such order shall, as soon as may be after the making thereof by her majesty in council, be published in the London Gazette; and so soon as any order in council made under the authority of this act or of the first-recited act shall be so gazetted, it shall in all respects, and as to all things therein contained, have and be of the same force and effect as if all and every part thereof were included in this act."

Orders gazetted to be of full Effect.

Sect. 87. "That a copy of every order of her majesty in council made under this act shall be laid before each house of parliament in the month of January in every year, if parliament shall be then sitting; or if parliament be not then sitting, within one week after the next meeting thereof."

Copies of Orders to be laid before Parliament.

Sect. 88. "That the registrar of every diocese to whom any order of her majesty in council made by virtue of this act shall be delivered shall forthwith register the same in the registry of his diocese; and if any such registrar shall refuse or neglect to register any such order he shall for every day during which he shall so offend forfeit twenty pounds; and if his offence shall continue for the space of three months, he shall forfeit his office, and it shall be lawful for the bishop of the diocese to appoint a successor thereto."

Penalty for Neglect of Registration.

Sect. 89. "That for such registration as aforesaid the registrar shall not be entitled to receive any fee or reward, but on every search for any such order he shall be entitled to receive a fee of three shillings, and for every copy or extract of any such order certified by him he shall be entitled to receive fourpence for every folio of ninety words; and the copy of every such entry, certified by the registrar, shall be admissible as evidence in all courts and places whatsoever."

Fee to Registrar.

Sect. 90. "That all the powers and authorities vested in the ecclesiastical commissioners for England by the first-recited act with reference to the matters therein contained shall be continued, and extended and apply to the said commissioners, and to the commissioners appointed by or under the provisions of this act, with reference to all matters contained in this act, and may be used and exercised by them as fully and effectually as if the said powers and authorities were repeated in this act; and the said first-recited act and this act shall be construed as if they were one and the same act."

Provisions of 6 & 7 Will. 4, c. 77, extended to this Act.

Sect. 91. "That, notwithstanding any thing in the first-recited act contained, the offices of treasurer and secretary to the said commissioners shall

Office of Treasurer and Secretary.

be united and shall be one office, and shall be held and the duties thereof performed by the same person; and Charles Knight Murray, Esquire, Barrister-at-Law, shall continue to be treasurer and secretary, and may hold the said office so long as he shall well demean himself therein; and upon any vacancy of the said office by death, resignation, or otherwise, the ecclesiastical commissioners for England shall appoint a successor thereto, by an instrument in writing under their common seal."

Ecclesiastical
Jurisdictions
continued.

Sect. 92. "That the temporary provisions of the said first-recited act shall continue and be in force until the first day of August One thousand eight hundred and forty-one, and if parliament shall be then sitting until the end of the then session of parliament: Provided always, that notwithstanding any thing in the said first-recited act or in this act contained, any bishop or archdeacon may hold visitations of the clergy within the limits of his diocese or archdeaconry, and at such visitations may admit churchwardens, receive presentments, and do all other acts, matters, and things by custom appertaining to the visitations of bishops and archdeacons in the places assigned to their respective jurisdiction and authority, under or by virtue of the provisions of the said first-recited act; and any bishop may consecrate any new church or chapel or any new burial-ground within his diocese."

4 & 5 VICT. c. 39.

An Act to explain and amend Two several Acts relating to the Ecclesiastical Commissioners for England. [21st June, 1841.]

6 & 7 Will. 4,
c. 77.

3 & 4 Vict.
c. 113.

Commission-
ers may ad-
journ Meet-
ings from
Day to Day.

6 & 7 Will. 4,
c. 77, s. 4.

3 & 4 Vict.
c. 113, s. 82.

Proviso as to
confirming
Proceedings.

Cathedrals in
which Hono-
rary Canon-
ries are
founded.

3 & 4 Vict.
c. 113, s. 23.

Honorary
Preferment

"Whereas an act was passed in the seventh year of the reign of his late majesty, intituled 'An Act for carrying into effect the Reports of the Commissioners appointed to consider the State of the Established Church in England and Wales with reference to Ecclesiastical Duties and Revenues, so far as they relate to Episcopal Dioceses, Revenues, and Patronage:' and whereas another act was passed in the last session of parliament, intituled 'An Act to carry into effect, with certain Modifications, the Fourth Report of the Commissioners of Ecclesiastical Duties and Revenues:' and whereas it is expedient to explain and amend certain provisions in the said acts contained; be it therefore enacted, &c. That notwithstanding any thing in either of the said recited acts contained, it shall be lawful for the ecclesiastical commissioners for England, at any meeting duly convened according to the provisions thereof, to continue and adjourn such meeting from day to day for any such number of days as they shall deem necessary; and the proceedings of the said commissioners, and all acts, matters, and things done and executed by them, on each and every of such days of adjournment, shall be as valid and effectual to all intents and purposes as if the same had been done and executed on the first day of such meeting: provided always, that no proceeding which requires to be ratified and confirmed by the common seal of the corporation shall be finally concluded by the affixing of the said seal on any such day of adjournment, unless notice of the intention to propose such proceeding for final consideration and decision shall have been sent together with every notice issued for such first day of meeting."

Sect. 2. "And for the removal of all doubts respecting the foundation of honorary canonries, be it declared and enacted, that honorary canonries are and shall be founded forthwith in the cathedral churches of Canterbury, Bristol, Carlisle, Chester, Durham, Ely, Gloucester, Norwich, Oxford, Peterborough, Ripon, Rochester, Winchester, and Worcester, and in the collegiate church of Manchester so soon as the same shall become a cathedral church, and in no other cathedral church; and that all the provisions of the secondly recited act which purport to relate to honorary canonries shall apply to the honorary canonries so founded."

Sect. 3. "That the holding of an honorary canonry, or of any prebend, dignity, or office, not now in any manner endowed, or whereof the lands,

tithes, or other hereditaments, endowments, or emoluments shall have been vested in the ecclesiastical commissioners for England, or which may hereafter be endowed to an amount not exceeding twenty pounds by the year, shall not be construed to prevent the holding therewith of more benefices than one; and that no such prebend, dignity, or office, which was vacant on the thirteenth day of August last, or became so at any time since, shall be deemed to have lapsed by reason of such vacancy, but hath remained and shall remain in the patronage of the archbishop or bishop of the diocese for the time being until a successor shall be collated thereto; and that every such prebend, dignity, or office, which shall hereafter become vacant, and every such honorary canonry, shall in like manner be and remain in the patronage of the archbishop or bishop of the diocese for the time being until a successor shall be collated thereto; any royal prerogative, statute, canon, or usage to the contrary notwithstanding."

may be held with Two Benefices. 3 & 4 Vict. c. 113, ss. 23, 51, and shall not be subject to Lapse.

Sect. 4. "And whereas it is not just that first fruits and tenths should be paid by the holders of dignities, prebends, and offices of which the estates are vested in the said ecclesiastical commissioners, and it is inexpedient to diminish the amount of the fund accruing to the governors of Queen Anne's bounty in respect of such prebends, dignities, and offices, and of sinecure rectories; be it enacted, That the holders of all dignities, prebends, and offices, whereof the lands, tithes, tenements, and other hereditaments and endowments shall have become so vested, shall be absolutely relieved and discharged from the payment of all first fruits and tenths in respect of such their dignities, prebends, and offices respectively; and that the said commissioners shall yearly and every year, on or before the thirty-first day of March, out of the monies at their disposal under the provisions of the secondly recited act, pay or cause to be paid to the treasurer of the said governors for the time being a sum equal to one twentieth part of the aggregate amount charged for first fruits on all dignities, prebends, offices, and sinecure rectories, of which the lands, tithes, tenements, or other hereditaments or endowments had on the last day of the preceding December become so vested in the said commissioners, as an average compensation for, and in full satisfaction of all claim of the said governors to, the first fruits heretofore payable in respect thereof; and the said commissioners shall also, subject to the proviso hereinafter contained, on or before the same day of March, and out of the same monies, pay or cause to be paid yearly and every year to the said treasurer for the time being the aggregate amount of the tenths due to the said governors for or in respect of all the same dignities, prebends, offices, and sinecure rectories: provided always, that nothing herein contained shall relieve any person from the payment of any tenths which he is now bound to pay by any covenant contained in any lease held by him: provided also, that in case of any bishop being deprived by the provisions of this act of any tenths heretofore receivable by him, the amount thereof shall from time to time and out of the same monies be paid or allowed to such bishop by the said commissioners."

First Fruits and Tenths of vacated Prebends, &c. 3 & 4 Vict. c. 113, ss. 48, 49, 50, 51, 54.

Sect. 5. "That the holding of a canonry residentiary, prebend, or office is not nor shall be necessary to the holding of the deanery of any cathedral church in England, nor to the entitling of any dean to his full share of the divisible corporate revenues of such church, although such share may not heretofore have been received by any preceding dean otherwise than as a canon residentiary; and that the holding of a prebend is not nor shall be necessary to the holding of either of the residentiary canonries in the cathedral church of Saint Paul in London which are in the direct patronage of her majesty."

Deans need not hold Prebends. 3 & 4 Vict. c. 113, s. 24.

Sect. 6. "That the provisions of the secondly recited act and of this act, by virtue of which any lands, tithes, or other hereditaments, endowments, or emoluments belonging to any dignity, prebend, or office, in any cathedral or collegiate church, have accrued to and become vested in, or may accrue to or become vested in, the said ecclesiastical commissioners, do and shall be construed to extend to and include all lands and tenements (except any house

Commissioners to have same Claims as duly qualified Prebendaries. 3 & 4 Vict. c. 113, ss. 49, 50, 51.

within the precincts of such church belonging to any canonry or usually held and enjoyed therewith, or any small portion of land situate within the limits and precincts of any cathedral or collegiate church, or in the vicinity of any residence house, which, under the provisions of the secondly recited act, may be reserved to such church, or permanently annexed to any residentiary house by the authority in the same act provided), tithes or other hereditaments, endowments, and emoluments, of what nature or kind soever, which, if the said secondly recited act had not been passed, any successor to such dignity, prebend, or office would have been entitled to possess or receive if duly qualified in all respects according to the statutes and usages of his church to possess or receive the same, and if qualified and ready at all times personally and duly to perform all the duties and services of such his prebend, dignity, or office."

Provisions of
3 & 4 Vict.
c. 113, to ap-
ply to other
non-resi-
dentiary Pre-
bends, &c.
Ss. 22, 51, 52,
53.

Application
of certain
Monies to
Parishes of
St. Margaret's
and St. John's
Westminster.
3 & 4 Vict.
c. 113, s. 31.

Sect. 7. "That all the provisions in the said secondly recited act and in this act contained relating to lands, tithes, or other hereditaments or endowments belonging to prebends not residentiary, shall apply also to all lands, tithes, and other hereditaments and endowments belonging to the respective offices of sacrist, custos, and hospitaller in any cathedral or collegiate church, or enjoyed by the holders thereof in right of such offices, as fully and effectually as if such offices had been expressly named as subject to such provisions."

Sect. 8. "That so much of the secondly recited act as relates to the application of certain monies therein specified towards making a better provision for the cure of souls in the respective parishes of Saint Margaret and Saint John, Westminster, shall be repealed; and that it shall be lawful to apply such monies towards making such better provision in such manner as by the authority in the same act provided shall be deemed best for the spiritual interests of the said parishes respectively; provided that such monies shall be exclusively applied within the respective parishes with which the canonries in the collegiate church of Saint Peter Westminster are connected, and from the proceeds of which they respectively accrue; and that with respect to the parish of Saint John, it shall also be lawful, by the like authority, in the same manner, to apply so much of the monies paid over to the ecclesiastical commissioners for England, or to their account, by the treasurer of the governors of the bounty of Queen Anne, under the provisions of the same act, as came to his hands by reason of the temporary suspension of the canonry in the said church, to which is now annexed the rectory of the said parish of Saint John, together with any interest which may have accrued thereon."

Archdeacon-
ries may be
endowed with
Benefices.
3 & 4 Vict.
c. 113, ss. 34,
35.

1 & 2 Vict.
c. 106.

Sect. 9. "That notwithstanding any thing in the said secondly recited act contained, it shall be lawful by the authority in the same act provided, with the consent of the bishop of any diocese, and of the patron of any benefice within the limits of any archdeaconry in such diocese, to endow such archdeaconry, by the annexation thereto of such benefice, such annexation to take effect immediately if the benefice be vacant at the time of such endowment, or otherwise upon the then next vacancy thereof; and every benefice so annexed, and every future holder thereof, shall be subject to all the provisions of an act passed in the second year of her present Majesty's reign, intituled 'An Act to abridge the holding of Benefices in Plurality, and to make better Provision for the Residence of the Clergy:' provided always, that no such annexation shall take effect as to any archdeacon in possession at the passing of this act, without his consent; and in default of such consent at the time when any benefice would otherwise so as aforesaid become annexed, or until such consent be given, during the incumbency of such archdeacon, the income and emoluments of such benefice shall, after due provision thereout being made for the cure of souls in the parish or district of such benefice, be applied, by the like authority, either in improving the existing house and buildings, or in providing a new house of residence for such benefice, or in improving or augmenting the glebe belonging thereto, or if no such improvement or augmentation be deemed necessary, then for the benefit of any poor benefice or benefices within the same archdeaconry."

Sect. 10. "And whereas it is by the thirdly recited act provided, that nothing thereinbefore contained shall be construed to prevent any archdeacon from holding, together with his archdeaconry, two benefices, under the limitations in the said act mentioned with respect to distance, joint yearly value, and population, and one of which benefices shall be situate within the diocese of which his archdeaconry forms a part, or one cathedral preferment in any cathedral or collegiate church of the diocese of which his archdeaconry forms a part, and one benefice situate within such diocese: And whereas doubts are entertained whether the said provision includes benefices of peculiar or exempt jurisdiction, and it is expedient that such doubts should be removed; be it therefore enacted, that the said provision shall extend and apply to benefices locally situate within the diocese of which any such archdeaconry shall form a part, although the same may not be subject to the jurisdiction of the bishop of such diocese."

The Provision in 1 & 2 Vict. c. 106, as to Archdeacons holding Two Benefices, to extend to Peculiars.

Sect. 11. "That any canonry or portion of the income of a canonry or benefice annexed to any archdeaconry under the provisions of the secondly recited act or this act may at any time, upon the representation of the bishop of the diocese, and by the authority in the said secondly recited act provided, be disannexed from such archdeaconry on the vacancy thereof, and annexed to any other archdeaconry in the same diocese."

Endowment may be disannexed from one Archdeaconry, and annexed to another.

Sect. 12. "That so much of the said secondly recited act as relates to the archdeacon of Nottingham and to the parish of Southwell shall be repealed; and that the Bishop of Lincoln, and not the Archbishop of York, shall from henceforth be the visitor of the collegiate church of Southwell, and shall enjoy all powers now vested in the said archbishop as such visitor; and that, notwithstanding any thing in the said secondly recited act contained, no appointment shall be made to any canonry or prebend in the said collegiate church, but that so soon as every person who was a member of the chapter thereof at the passing of the same act shall have ceased to be such member, all lands and tenements, tithes, and other hereditaments belonging to the said church or the chapter thereof, except any right of patronage, shall, without any conveyance or assurance in the law other than the provisions of this act, accrue to and be vested in the ecclesiastical commissioners for England, and their successors, for the purposes of the secondly recited act and of this act; and that out of the lands, tenements, tithes, and other hereditaments and endowments which shall so accrue to the said commissioners, or the proceeds thereof, competent provision shall be made, by the authority in the said secondly recited act provided, and in such manner as shall be by such authority deemed expedient, for the services of the said church of Southwell, and for the maintenance and reparation of the fabric of the said church, and for any minor canon or officer thereof; and that the patronage of all benefices with cure of souls possessed by the said chapter shall be transferred to and vested partly in the Bishop of Ripon and partly in the Bishop of Manchester, subject to the same provisions as are in the said secondly recited act contained with respect to benefices in the patronage of the prebendaries of the said collegiate church; and that so soon as conveniently may be, and by the like authority, and out of the same lands, tenements, tithes, or other hereditaments or endowments, or the proceeds thereof, or out of any other lands, tithes, or other hereditaments or endowments now or in the meantime vested in the said commissioners, or any emoluments already accrued or hereafter accruing to them in respect of the canonries or prebends of the said church, provision shall be made for the spiritual care of the said parish of Southwell, and for the competent endowment of ministers in the several parishes within the deanery of Southwell, wherein any of such lands, tenements, tithes, and hereditaments are respectively situate or arise; and the vicarage of Southwell shall be endowed with such portion of the tithes of the parish of Southwell, or with such other provision, as by the like authority may be determined on, and may be constituted a rectory with cure of souls; and that on the then next avoidance thereof the Archdeacon of Nottingham for the time being shall become

Further Provisions respecting Southwell. 3 & 4 Vict. c. 113, ss. 18, 36, 41.

ipso facto rector of the said rectory, and the said rectory shall thenceforth be permanently annexed to the archdeaconry of Nottingham: provided always, that the said rectory of Southwell and the incumbent thereof shall continue subject to all the provisions of the thirdly recited act passed in the second year of her present Majesty's reign."

Durham
University
Trusts.
3 & 4 Vict.
c. 113, s. 37.

Sect. 13. "And whereas inconvenience arises from the mode in which certain property is now held partly by the bishop and partly by the dean and chapter of Durham in trust for the university of Durham; be it enacted, that it shall be lawful, by the authority in the said secondly recited act provided, with the consent of the said university, and also of the said bishop or of the said dean and chapter, as the case may be, to make any such arrangements as may be deemed fit by the like authority for varying, transferring, or annulling any of the trusts upon which any monies or securities for money, or any lands, tenements, tithes, or other hereditaments, are now held for the benefit of the said university, and for transferring and vesting such monies, securities for money, lands, tenements, tithes, or other hereditaments, or any part thereof, in such other manner and in such other persons or body corporate as may be deemed by the like authority most beneficial to the said university; and that the said university of Durham may, by the name of 'The Warden, Masters, and Scholars of the University of Durham,' take and purchase and hold lands, tenements, tithes, and other hereditaments to them and their successors, the statutes of mortmain or any other act or acts to the contrary notwithstanding; and that, when the lands, tenements, tithes, or other hereditaments, monies or securities for money, or any part thereof, now held by the said bishop or by the said dean and chapter in trust for the said university, shall be vested, by the authority aforesaid, in the said warden, masters, and scholars, they shall have and enjoy all the powers of sale, of purchase, of holding in mortmain, of leasing, of management, of applying the principal monies, and the rents, dividends, and interest thereof, or of such part thereof as shall be vested in them, in as full and ample manner as the said dean and chapter now have and enjoy the same powers by virtue of an act passed in the third year of the reign of his late majesty, intituled 'An Act to enable the Dean and Chapter of Durham to appropriate Part of the Property of their Church to the Establishment of a University in connexion therewith for the Advancement of Learning;' and that it shall be lawful for all bodies corporate, aggregate, or sole, and all other incapacitated persons named in the said act, to sell and convey to the said warden, master, and scholars, and their successors, all such lands, tenements, and hereditaments as by the said act they are enabled to sell and convey to the said dean and chapter, and in such manner and by such conveyances and assurances as in the said act are mentioned; and that it shall be lawful for the said warden, masters, and scholars to apply the building fund to the payment of expenses already incurred by the said university in erecting and completing, altering, repairing, or improving any building for the use of the said university, or for the use of any person or persons for whom the said university was or is bound to provide any office or building under an order of her Majesty in council, bearing date the nineteenth day of July, one thousand eight hundred and thirty-seven, relating to the castle of Durham, and to the erection and completion, alteration, reparation, or improvement of any building erected or to be erected, not only on land now vested in the said dean and chapter, but also on land now vested in the said bishop in trust for the said university, or on land to be hereafter acquired by the said warden, masters, and scholars for any of the foregoing uses; and that it shall be lawful, by the like authority, with the consent of the said university, and also of the said bishop and of the said dean and chapter, to transfer to the said warden, masters, and scholars the whole or any part of the powers relating to the government of the said university, and the order and discipline to be observed therein which are now vested by the last-mentioned act in the said dean and chapter."

2 & 3 Will. 4,
c. 19.
(Private.)

St. David's,
Llandaff, and

Sect. 14. "That so much of the said secondly recited act as relates to the division and application of the existing corporate revenues of the chapters of

the cathedral churches of Saint David and Llandaff respectively, and to the application of the endowments belonging to the prebends in the collegiate church of Brecon, shall be and the same is hereby repealed."

Sect. 15. "That, notwithstanding any thing in the secondly recited act contained, any minor canon in any cathedral or collegiate church may take and hold, together with his minor canonry, any benefice which is within the distance prescribed by the said act; and that in every case in which any dean before the passing of the same act enjoyed a right, as such dean, to appoint any minor canon, nothing therein contained shall be construed to deprive him or his successors thereof; and that, in the construction of the same act and of this act, the term 'minor canon' shall not be construed to extend to or include any other than a spiritual person."

Sect. 16. "That in every cathedral church in which any canonry or canonries is or are or shall be suspended, a majority of the existing members of chapter, including or not including the dean, according as his presence may or may not be by law required, shall at all times be a sufficient number of canons for constituting a chapter."

Sect. 17. "That so much of the secondly recited act as relates to the purchase, by the ecclesiastical commissioners for England, of ecclesiastical rectories without cure of souls, shall be construed to extend and apply to any ecclesiastical rectory which shall by the archbishop of the province and the bishop of the diocese be certified to be, and shall by the said commissioners be deemed to be, an ecclesiastical rectory without cure of souls, although there shall be no vicarage endowed or perpetual curacy belonging thereto or connected therewith; provided that when any such ecclesiastical rectory purchased by the said commissioners shall have become suppressed under the provisions of the same act, the whole, if it be deemed necessary, or such part as shall be deemed necessary by the said commissioners, of the lands, tithes, or other endowments belonging to such rectory, and of the proceeds thereof, shall, by the authority in the same act provided, be set apart and applied towards the spiritual care of the population of the parish or district in which such lands, tithes, or other endowments are situate or accrue, in such manner as by the like authority shall be deemed expedient."

Sect. 18. "That the provisions of the secondly recited act relating to the disposal of residence houses, and houses attached to any dignity, prebend, or office in the precincts of the respective cathedral and collegiate churches, and also so much of an act passed in the second year of the reign of his late majesty as annexes to the archdeaconry of Durham the house of residence therein mentioned, shall be repealed; and that the dean and chapter of any cathedral or collegiate church, with the consent of their visitor, may from time to time sanction and confirm the exchange of houses of residence, or of houses attached to any dignities, offices, or prebends in the precincts of such church, among the canons of such church, or may make any such arrangement to take effect at any future time, or may assign any one of such houses being vacant to any canon willing to accept the same in lieu of the house theretofore occupied by him, and thereupon any house no longer required by any canon may by the said dean and chapter be disposed of, in such way as they shall deem fit, with the consent of their visitor, and of the ecclesiastical commissioners for England, signified under their common seal; provided that all acts, matters, and things relating to any such house already done under the last-mentioned provisions of the said secondly recited act shall be valid and effectual to all intents and purposes."

Sect. 19. "That the provisions of the secondly recited act which purport to relate to the endowments belonging to the suspended prebends in the cathedral church of Lichfield were intended to apply and do apply to all the lands and tenements, tithes, and other hereditaments and endowments, which are or are to be vested in the said ecclesiastical commissioners, by or under the provisions of the said act, by reason of the vacancy of any canon residentiary, or of any prebend, dignity, or office not residentiary, in the said church."

Brecon Revenues.
Provisions repealed 3 & 4 Vict. c. 113, ss. 38, 39, 40. Amendments relating to Minor Canon. 3 & 4 Vict. c. 113.
Ss. 44, 45, 46.
S. 93.

Majority of Members to constitute a Chapter.
3 & 4 Vict. c. 113, s. 47.

Sinecure Rectories in Private Patronage.
3 & 4 Vict. c. 113, s. 48.

Disposal of Residence Houses.
3 & 4 Vict. c. 113, s. 58; 2 & 3 Will. 4, c. 10 (Pr.)

Correction of Error respecting Endowments belonging to Lichfield Prebends.
3 & 4 Vict. c. 113, s. 63.

Enlarged
Discretion as
to Mode of
fixing In-
comes.
3 & 4 Vict.
c. 113, ss. 52,
66.

Powers of
Exchange,
&c. extended
to all Corpo-
rations Sole.
3 & 4 Vict.
c. 113, s. 68.

Provisions of
3 & 4 Vict.
c. 113, s. 73,
respecting
Exchange
of Advow-
sons, to au-
thorize Ex-
change by
Ecclesiastical
Corporations.
Exchanges of
Advowsons
may be made
for the Pur-
pose of
Unions.
1 & 2 Vict.
c. 106, s. 16.

Sect. 20. "That, notwithstanding any thing in the secondly recited act contained relating to the payment of fixed annual sums by certain deans and canons, and the payment of other annual sums to certain deans and chapters therein respectively named or referred to, or relating to the transfer of parts of the lands, tithes, or other hereditaments therein specified to the chapters of York, Chichester, Exeter, Hereford, Lichfield, Salisbury, and Wells respectively, for the purposes therein respectively specified, it shall be lawful, by the authority in the same act provided, to carry such purposes or any of them into effect by any mode of payment, contribution, augmentation, or endowment which may be deemed fit, as well as by the modes in the said act specified; and that the scale of payments and receipts may from time to time in any case be revised, and if need be, varied by the like authority, so as to preserve, as nearly as may be, the intended average annual incomes respectively, but not so as to affect any dean or canon in possession at the time of making any such variation."

Sect. 21. "That the provisions of the secondly recited act relating to the sale, transfer, or exchange of any lands, tithes, or other hereditaments, the purchase of other lands, tithes, or other hereditaments in lieu thereof, or the substitution of any lands, tithes, or other hereditaments for any money payment, do and shall extend to authorize the substitution of any money payment for any lands, tithes, or other hereditaments, and do and shall include and apply to all lands, tithes, or other hereditaments in the possession or enjoyment of any dean, canon, prebendary, or other dignitary or officer of any cathedral or collegiate church, or in the possession of the ecclesiastical commissioners for England; and the consent in writing under the hand only of any such dean, canon, prebendary, or other dignitary or officer, shall be deemed to be a consent within the meaning of the said act."

Sect. 22. "That it is and shall be competent to the authority in the first recited act provided to make arrangements, under and according to the provisions of the said act, for improving the value or making a better provision for the spiritual duties of ill-endowed parishes or districts by means of the exchange of advowsons, or other alterations in the exercise of patronage, notwithstanding that such advowsons, or any or either of them, or such patronage, shall be vested in or belong to any ecclesiastical corporation aggregate or sole."

Sect. 23. "That whenever it shall be made to appear to the ecclesiastical commissioners for England that it would be expedient to make an exchange of an advowson, or of any right of patronage, for any other advowson or right of patronage, with a view to proceedings being taken for the union of two or more benefices under the provisions of the said act passed in the second year of her present Majesty's reign, it shall be lawful for the said commissioners, with the consent of the patron or patrons of every such advowson or right of patronage, and also, in case any such advowson or right of patronage shall be vested in or belong to any ecclesiastical corporation aggregate or sole, with the consent of the bishop of the diocese, or in the case of benefices lying in more than one diocese then with the consent of the bishop of each diocese, and where a bishop shall be himself one of the patrons with the consent of the archbishop of the province, to certify the same to such archbishop; and that thereupon, if the said archbishop shall think fit, proceedings may be taken, under and in pursuance of the provisions of the said last-mentioned act, for effecting the union of such benefices; and the said archbishop, at the same time that he shall certify to her Majesty in council the inquiry and consent referred to in the same act, shall transmit such certificate of the said commissioners to her Majesty in council, together with an abstract of the title to any advowson or right of patronage mentioned in the certificate of the said commissioners, other than advowsons or rights of patronage belonging to any such ecclesiastical corporation as aforesaid, and the opinion of counsel on such title; and that thereupon it shall be lawful for her Majesty in council, in any order for such licence made and issued under the provisions of the same act, to order that such exchange as aforesaid shall take effect; and

upon such order being made and registered pursuant to the said act the said exchange shall be valid and effectual, without any other assurance in the law, and notwithstanding that the advowsons or rights of patronage, or any or either of them, exchanged by virtue of the said order, were or was previously thereto vested in or belonged to any such ecclesiastical corporation as aforesaid; and the respective exchangees, their heirs, appointees, successors, and assigns, shall thenceforth stand seised of the advowsons or rights of patronage so taken in exchange, in the same manner, to all intents and purposes, and subject to the same trusts, powers, limitations, charges, and incumbrances (if any), as the advowsons or rights of patronage by them given in exchange were respectively held and were subject."

Sect. 24. "That all the provisions relating to the consent of patrons of benefices, contained in the thirdly recited act passed in the second year of the reign of her present Majesty, shall be construed to apply to the consent of patrons under the provisions of the secondly recited act and of this act, as fully and effectually as if the same had been therein and herein repeated and enacted respecting the patrons of benefices affected by such secondly recited act and this act."

Consent of Patrons how to be given. 1 & 2 Vict. c. 106, s. 125 —128 inclusive. 3 & 4 Vict. c. 113, ss. 71, 72, 73, 74. Division of Corporate Revenues at Windsor and Lincoln. 3 & 4 Vict. c. 113, s. 75.

Sect. 25. "And be it enacted, subject to the provisions of the said secondly recited act with respect to the interests of existing incumbents, That in the Queen's free chapel of St. George within her Castle of Windsor, so soon as a vacancy shall occur in the deanery, the share of the divisible corporate revenues from time to time payable to each canon appointed after the passing of the same act, and to the ecclesiastical commissioners for England in respect of each suspended canonry, shall be one fourteenth part of the whole of such revenues, and the remainder thereof shall be paid to the dean; and in the cathedral church of Lincoln, so soon as the chapter thereof shall entirely consist of a dean and canons appointed after the passing of the said secondly recited act, the whole divisible corporate revenues shall from time to time be divided into six shares, and two of such shares shall be paid to the dean, and one of such shares shall be paid to each canon; and in the mean time such revenues may be so apportioned by the authority in the said secondly recited act provided as to afford just shares thereof to the new members of chapter."

Sect. 26. "That the provisions of the secondly recited act respecting the augmentations of benefices under the provisions of an act passed in the second year of the reign of his late majesty King William the Fourth, intituled 'An Act to extend the Provisions of an Act passed in the twenty-ninth Year of the Reign of his Majesty King Charles the Second, intituled "An Act for confirming and perpetuating Augmentations made by Ecclesiastical Persons to small Vicarages and Curacies;" and for other Purposes,' therein recited, do and shall extend and apply to every dean, canon, prebendary, or other dignitary or officer whose revenues are or may be affected by any of the provisions of the said two first-recited acts or either of them, or of this act; and if for the purpose of more fully carrying into effect the provisions of the said act relative to augmentations it shall appear to the said commissioners and to any bishop or chapter to be expedient that any land belonging to such bishop or chapter adjacent to or situate within the distance of twenty miles from any city or town should be let or sold for purposes of building or other improvement, it shall be lawful for such bishop or chapter, as the case may be, with the consent of the said commissioners under their common seal, to grant any lease or leases of such land for such period or periods and upon such conditions as the said commissioners, having regard to the circumstances of the case, shall deem just and equitable, or, with the like consent, to convey the said land in fee simple for such price as shall appear to the said commissioners to be the full value thereof; provided that the rent in the former case, or the purchase money in the latter case, after reserving to the bishop or chapter, as the case may be, an annual payment equal to the amount theretofore enjoyed in respect of the land so let or sold, shall be wholly applied to the purposes of the said last-mentioned act, the consent of the said commis-

Augmentations under 1 & 2 Will. 4, c. 45, may be made by all Corporations Sole; 3 & 4 Vict. c. 113, s. 76.

and Building Land may be let or sold for the Purpose.

sioners being in all cases necessary to the particular application thereof: Provided also, that if it be deemed expedient with a view to the better effecting of such purposes, such rent or purchase money, or any part thereof, may, with the like consent, be at any time reinvested in the purchase of land."

Commission-
ers may pay
Agents, &c.

Sect. 27. "That it shall be lawful for the ecclesiastical commissioners for England, out of the revenues accruing to them under the said recited acts respectively or this act, to pay and defray all necessary law charges, and to make any such allowance for costs, charges, expenses, pains, and trouble as to the said commissioners shall appear just and reasonable, to any person employed by them in receiving or paying any monies accruing to them, or in auditing any accounts relating thereto, or in surveying, valuing, or performing any other duty relating to or connected with the possession or management of any lands, tithes, or other hereditaments vested in them the said commissioners, or relating to or connected with any other matter or thing to be done or executed under the authority of the said recited acts, or either of them, or of this act."

Act not to
apply to
Saint Asaph
and Bangor,
&c.
5 & Will. 4,
c. 30.

Sect. 28. "That nothing in this act contained shall, except as hereinafter specified, extend or apply to the dioceses or cathedral churches of St. Asaph and Bangor or either of them; and that an act passed in the sixth year of the reign of his late majesty, intituled 'An Act for protecting the Revenues of vacant Ecclesiastical Dignities, Prebends, canonries, and Benefices without Cure of Souls, and for preventing the Lapse thereof, during the pending Inquiries respecting the State of the Established Church in England and Wales,' and another act passed in the seventh year of the reign of his said late majesty, intituled 'An Act for suspending for one Year Appointments to certain Dignities and Offices in Cathedral and Collegiate Churches, and to Sinecure Rectories,' and such parts of another act passed in the second year of the reign of her present majesty, intituled 'An Act to suspend until the first day of August One thousand eight hundred and forty certain Cathedral and other Ecclesiastical Preferments, and the Operation of the new Arrangement of Dioceses upon the existing Ecclesiastical Courts,' as relate to the two last-mentioned acts, so far only as the same acts and parts of an act apply to the said two last-mentioned dioceses and churches, or either of them, and also the temporary provisions of the first herein-recited act, shall respectively continue and be in force until the first day of August in the year one thousand eight hundred and forty-two, and, if parliament shall be then sitting, until the end of the then session of parliament: Provided always, that notwithstanding any thing in the same acts, or any or either of them, or in this act contained, it shall be lawful for the bishop of Bangor for the time being to collate to any vacant canonry, prebend, dignity, or office in the said cathedral church of Bangor not having any estate or endowment belonging thereto; and also that any bishop or archdeacon may hold visitations of the clergy within the limits of his diocese or archdeaconry, and at such visitations may admit churchwardens, receive presentments, and do all other acts, matters, and things by custom appertaining to the visitations of bishops and archdeacons in the places assigned to their respective jurisdiction and authority under or by virtue of the provisions of the said first or secondly recited act; and any bishop may consecrate any new church or chapel or any new burial ground within his diocese."

6 & 7 Will. 4,
c. 67.

2 & 3 Vict.
c. 55.

Construction
of the Terms
'Lands,'
&c.

Sect. 29. "And for the purpose of removing all doubts respecting the meaning of the terms 'real estates,' 'lands,' and 'lands, tenements, and hereditaments,' be it declared and enacted, That the said terms, wherever they occur, either in the recital or in the enactments of either of the said recited acts, or in any scheme, or any order of her Majesty in council, prepared and issued under the authority of those acts or either of them, shall respectively be construed to include and comprehend lands, tithes, tenements, and other hereditaments, except any right of ecclesiastical patronage; and that the said first-mentioned terms, and also the term 'lands, tithes, tenements, or other hereditaments,' in any part of either of the said recited acts or in this act or in any such scheme or order in council contained, shall be construed to apply and extend to lands, tithes, tenements, and other here-

ditaments, as well in reversion as in possession, and to any leasehold interest therein; and that the term 'tithes' in either of the said acts or in this act contained shall extend to and comprehend rents-charges allotted or assigned in lieu of tithes; and the ecclesiastical commissioners for England shall, in respect of all lands, tithes, tenements, or other hereditaments, endowments, or emoluments, already vested or liable to be vested in them by or under the provisions of either of the said acts or of this act, be deemed to be the owners or joint owners thereof respectively, as the case may be, for all the purposes of an act passed in the seventh year of the reign of his late majesty King William the Fourth, intituled 'An Act for the Commutation of Tithes in England and Wales,' and of the several acts to explain and amend the same."

Provisions of Tithe Commutation Acts extended to Commissioners.

6 & 7 Will. 4, c. 71.

Sect. 30. "That all the powers and authorities vested in her Majesty in council and in the ecclesiastical commissioners for England by the two first-recited acts or either of them with reference to the matters therein respectively contained, and all other the provisions of the secondly recited act relating to schemes and orders prepared, made, and issued for the purposes thereof, shall be continued, and extended and apply to her Majesty in council and to the said commissioners, and to all schemes and orders prepared, made, and issued by them respectively with reference to all matters contained in this act, as fully and effectually as if the said powers, authorities, and other provisions were repeated in this act; and that so much of the said secondly recited act as enacts that the said first-recited act and the said secondly recited act shall be construed as if they were one and the same act shall be repealed."

Powers of 6 & 7 Will. 4, c. 77, and 3 & 4 Vict. c. 113, extended to this Act.

Sect. 31. "That this act may be amended or repealed by any act to be passed in the present session of parliament."

Act may be amended this Session.

ABSTRACT(a) OF THE ORDERS IN COUNCIL(b).

1. Oxford and Salisbury Territorial Alterations.

(Dated 5th October, 1836. Gazetted on the 7th, 11th, and 18th, and registered at Oxford and Salisbury on the 10th of the same month.)

The whole county of Berks, and those parts of the county of Wilts which are insulated therein, forming together the archdeaconry of Berks, transferred, *with the consent of the respective bishops*, from the diocese of Salisbury to that of Oxford; and

The right of appointing the Archdeacon of Berks vested in the Bishop of Oxford.

2. Salisbury, Exeter and Bristol Territorial Alterations.

(Dated 5th October, 1836. Gazetted on the 7th, 11th and 18th, registered at Bristol and Blandford on the 8th, at Salisbury on the 10th, and at Exeter on the 14th of the same month.)

The whole county of Dorset (*except the parish of Stockland after mentioned*) and the parish of Holwell in the county of Somerset, forming together the archdeaconry of Dorset in the diocese of Bristol, and the parish of Thornecombe in the diocese of Exeter, and in the county of Devon, but insulated in the county of Dorset, transferred from the dioceses of Bristol and Exeter respectively to the diocese of Salisbury, *with the consent of the Bishops of Exeter and Salisbury*, and the said parish of Thorneycombe included in the archdeaconry of Dorset and deanry of Bridport.

The said parish of Stockland in the diocese of Bristol, and in the county of Dorset, but insulated in the county of Devon, transferred from the diocese of Bristol to that of Exeter, *with the consent of the bishop*, and included in the archdeaconry of Exeter, and deanry of Honiton; and

(a) This abstract was drawn up by C. K. Murray, Esq., Secretary to the Ecclesiastical Commissioners, for whose kind permission to insert in this work I am much obliged.

(b) The four first Orders in Council having been gazetted before they were

registered, became law only upon the day on which the registry was completed; but all the others having been registered in the first instance, became law immediately upon their publication in the Gazette.

The right of appointing the Archdeacon of Dorset vested in the Bishop of Salisbury.

3. Gloucester and Bristol Union.

(Dated 5th October, 1836. Gazetted on the 7th, 11th and 18th, and registered at Bristol, Blandford and Gloucester, on the 8th of the same month.)

The whole diocese of Bristol, except the archdeaconry of Dorset, united to the diocese of Gloucester and named the diocese of Gloucester and Bristol.

The sees also united, and the Bishop of Gloucester created bishop, *ipso facto*,—to be possessed of all the property, revenues, advowsons, and patronage belonging to the see of Bristol—created a body corporate by the name of the Bishop of Gloucester and Bristol,—to occupy the same seat in the cathedral, and exercise the same authority over the dean and chapter, as former Bishops of Bristol,—exempted from payment of first fruits and all fees and expenses in respect of his so becoming Bishop of Gloucester and Bristol. On the first avoidance of the see the warrant for the election of a bishop to be issued to the chapter of Bristol, and afterwards alternately to the chapter of Bristol and that of Gloucester. Episcopal acts requiring confirmation by the dean and chapter to be confirmed by the dean and chapter to whom the right would have belonged if the sees had not been united.

The deanry of the Forest in the diocese of Gloucester, but within the archdeaconry of Hereford, transferred to the archdeaconry of Gloucester; and the deanries of Bristol, Cirencester, Fairford, and Hawkesbury in the archdeaconry of Gloucester, separated therefrom, and together with all parishes within the city of Bristol, which latter are to be included in the deanry of Bristol, constituted the *new* archdeaconry of Bristol, and the right of appointing the archdeacon thereof vested in the Bishop of Gloucester and Bristol.

The site of the episcopal palace at Bristol to be sold, and the proceeds, together with the sum lately recovered as damages for injury done to the said palace, transferred to the Ecclesiastical Commissioners for England, and to be applied towards the purchase or erection of a second episcopal residence at or near Bristol.

4. Ripon Bishopric Foundation.

(Dated 5th October, 1836. Gazetted on the 7th, 11th and 18th, and registered at York on the 8th, Ripon on the 11th, and at Chester on the 13th of the same month.)

The collegiate church of Ripon constituted a cathedral church, and the seat of a bishop, within the province of York. The dean and prebendaries styled dean and canons, and to be the dean and chapter, subject to such future orders and regulations as may be made by competent authority.

The town and borough of Ripon, and all such parts of the deanries of the Ainsty and Pontefract, in the archdeaconry, county and diocese of York, as adjoin to the western boundaries of the liberty of the Ainsty, and of the wapentakes of Barkston Ash, Osgoldcross, and Staincross respectively, and all that part of the county of York which is in the archdeaconry of Richmond and diocese of Chester, and the whole parish of Aldborough in the county of York, *with the consent of the Archbishop of York and Bishop of Chester*, constituted the *new* diocese of Ripon; and the person who should be duly elected by the said dean and chapter to be the bishop thereof, and invested with the same rights and privileges as the bishops of England and Wales, and to be subject to the metropolitan jurisdiction of the Archbishop of York. The said Bishop of Ripon to be a body corporate, and the said collegiate church to be his cathedral with the privileges of an episcopal seat, and the said bishop to exercise the like jurisdiction in it as other bishops of England and Wales in their respective cathedrals. Power to the bishop and dean and chapter to do all such acts either jointly or separately as other bishops and deans and chapters may do in the province of York.

The diocese of Ripon to be divided into the archdeaconries of Richmond and Craven; the former to consist of the deanries of Richmond, Catterick, and Boroughbridge, and so much of the deanry of Kirby Lonsdale as is in

the county of York; and the latter of the deanries of Pontefract and Craven. The right of appointing archdeacons to both archdeaconries to be vested in the Bishop of Ripon. Orders in Council.

The deanry of Pontefract in the archdeaconry of Craven to consist of all those parishes and places within the respective deanries of Pontefract and the Ainsty which will be within the diocese of Ripon.

5. *York and Durham Territorial Alterations and Revenue Charges, and Ripon Bishopric Endowment.*

(Dated 22nd December, 1836. Gazetted 24th and 27th January, and 10th February, 1837.)

All places within the peculiar jurisdiction of Hexhamshire in the diocese of York, but locally situate in the county of Northumberland and diocese of Durham, *with the consent of the Archbishop of York*, included in the latter diocese, and in the archdeaconry of Northumberland and deanry of Newcastle upon Tyne.

The deanry of Craven, *with the like consent*, transferred from the diocese of York to that of Ripon.

The parish of Craike, in the county, diocese, and archdeaconry of Durham, and subject to the peculiar jurisdiction of the dean and chapter of Durham, but insulated in the county and diocese of York, *with the like consent*, included in the latter diocese and in the archdeaconry of Cleveland.

Certain estates at Ripon belonging to the see of York, and described in the Schedule, transferred, *with the like consent*, to the see of Ripon.

All the estates of the see of Durham situate in Howden and Howdenshire, Northallerton and Allertonshire, Borrowby, Brompton, Romanby, Osmotherly, and Sowerby Grange in the county of York, transferred to the see of Ripon; the Bishop of Ripon to be entitled to the rents and profits from the day of the death of William late Bishop of Durham (21st February, 1836).

The Bishop of Durham (for the purposes of the act 6 & 7 Will. 4, c. 77, and so as to leave him an average annual income of 8000*l.*) to pay to the Ecclesiastical Commissioners for England the fixed annual sum of 11,200*l.* by half-yearly payments, on the 1st of February and 1st of August in every year; the first being made on the 1st February, 1837.

One-third only of the first fruits to be paid by Edward Bishop of Durham, and the remaining two-thirds by the Ecclesiastical Commissioners for England.

The fees and stipends granted out of the revenues of the see by former Bishops of Durham to any officer of the county palatine of Durham who held his office by patent, at the passing of the act 6 Will. 4, c. 19, for separating the palatine jurisdiction from the bishopric of Durham, to be paid by the Ecclesiastical Commissioners for England out of the monies so as aforesaid to be paid to them, during the term granted by the patent, notwithstanding the abolition of the office.

The average annual income of the Bishop of Ripon to be 4500*l.*, and to that end the Ecclesiastical Commissioners for England to pay him and his successors, out of the same monies, the fixed annual sum of 2200*l.* by half-yearly payments, on the 13th of April and the 13th of October in every year; the first being made on the 13th April, 1837.

And a further fixed annual sum of 500*l.* by like payments, until an episcopal house of residence shall be provided for the see of Ripon.

The advowson of the vicarage of Birstall in the County of York, transferred from the Archbishop of York, *with his consent*, to the Bishop of Ripon.

The advowsons of the rectory of Birkby, the vicarage of Osmotherley, the vicarage and perpetual curacy of Leak and Nether Siltion in the county of York, and of the rectory of Craike aforesaid, transferred from the Bishop of Durham to the Bishop of Ripon.

6. *Lichfield and Worcester Territorial and Patronage Alterations.*

(Dated 22nd December, 1836. Gazetted 24th and 27th January, and 10th February, 1837.)

The archdeaconry of Coventry, in the county of Warwick and diocese of

Lichfield and Coventry transferred, *with the consent of the Bishop of Worcester*, to the diocese of Worcester.

The remaining part of the diocese of Lichfield and Coventry and the see thereof named the diocese and see of Lichfield, and the Bishop thereof styled Bishop of Lichfield; such alteration in name not to affect any right, privilege or power theretofore exercised or enjoyed by him *quà* Bishop of Lichfield and Coventry.

The right of appointing the Archdeacon of Coventry vested in the Bishop of Worcester.

The advowsons of the rectory of St. Philip and of the perpetual curacy of Christ Church in the town of Birmingham, transferred from the Bishop of Lichfield to the Bishop of Worcester.

7. *Lincoln, Norwich and Ely Territorial Alterations, and Ely Revenue Charge.*

(Dated 19th April. Gazetted 30th May and 2nd and 6th June, 1837.)

The archdeaconry and county of Bedford, and so much of the archdeaconry of Huntingdon as is co-extensive with the county of Huntingdon, *with the consent of the Bishop of Lincoln* transferred from his diocese to that of Ely.

The parish of Rickinghall Inferior in the deanry of Blackburne, but united with the parish of Rickinghall Superior in the deanry of Hartismere, both in the archdeaconry of Sudbury and diocese of Norwich, included in the said deanry or Hartismere; and the said deanry of Hartismere and that of Stow, also in the archdeaconry of Sudbury, included in the archdeaconry of Suffolk in the same diocese, and the remainder of the archdeaconry of Sudbury transferred to the diocese of Ely.

Not to affect any personal union theretofore granted by any Bishop of Norwich according to the usage of the see of Norwich for enabling any clergyman to hold together two livings, as it regards any livings either both or one only of which is thereby transferred to the diocese of Ely.

The deanry of Camps in the diocese and archdeaconry of Ely included in the said archdeaconry of Sudbury.

The right of appointing the archdeacons of Bedford, Huntingdon and Sudbury vested in the Bishop of Ely.

The Bishop of Ely (for the purposes of the act 6 & 7 Will. 4, c. 77, and so as to leave him an average annual income of 5500*l.*) to pay to the Ecclesiastical Commissioners for England the fixed annual sum of 2500*l.* by half-yearly payments on the 5th of April, and the 5th of October in every year; the first to be made on the 5th October, 1837.

Two-thirds only of the first fruits to be paid by Joseph Bishop of Ely, and the remaining third by the Ecclesiastical Commissioners for England.

The fees and stipends granted out of the revenues of the see by former Bishops of Ely to any secular officer of the Isle of Ely who held his office by patent for life at the passing of the act 7 Will. 4, c. 53, for extinguishing the secular jurisdiction of the Bishop of Ely, to be paid by the Ecclesiastical Commissioners for England, during the life of such officer, whether his office shall have been abolished by the said act or not.

8. *Welsh Language.*

(Dated 10th May, 1837 (b).)

Approval of a Special Report of the Ecclesiastical Commissioners for England, whereby they proposed to abstain for the present, for reasons given in the Report and an appendix, from suggesting any scheme for carrying into effect the provisions of sect. 11 of the act 6 & 7 Will. 4, c. 77, whereby it is enacted that they should prepare and lay before his Majesty in council such scheme as should appear to them to be best adapted for preventing the appointment of any clergyman not fully conversant with the Welsh language to

(b) Not gazetted.

any benefice with cure of souls in Wales in any parish, the majority of the inhabitants of which do not understand the English Language (c). Orders in Council.

Intimation from his Majesty in Council that the Commissioners are to keep the subject in view.

Appendix, containing evidence of and letters from the four Welsh bishops.

9. *Durham Benefices Augmentation.*

(Dated 21st June. Gazetted 14th and 27th July, and 1st August, 1837.)

Annual Augmentations of the following poor benefices in the diocese of Durham, which the late William Bishop of Durham had agreed to grant, but which he left uncompleted at the time of his death, to be granted by the Ecclesiastical Commissioners for England; viz. Esh, 125*l.*, St. Helen's Auckland, 82*l.*; Etherley, 130*l.*; Shildon, 225; and Escomb, 120*l.*; payable half-yearly on the 21st of February and the 21st of August in every year, and to commence from the 21st of February, 1836, the day of the death of the late bishop.

Certain lands which had been set apart for the purpose by the late Bishop, and described in a schedule, permanently annexed to the perpetual curacy of Etherley, in addition to the above payment.

Power reserved to the Ecclesiastical Commissioners for England, of recommending the augmentation of Trinity Chapel in the parish of Stockton upon Tees, whenever the conditions required by the said late bishop shall have been complied with.

10. *Revenue Charges upon certain larger Sees.*

(Dated 21st of June. Gazetted 18th, 25th and 28th July, 1837.)

The See of Canterbury to pay	£7300
— York	1100
— London	5000
— Winchester	3600
— Bath and Wells	1000
— Worcester	2300

to the Ecclesiastical Commissioners for England by equal half-yearly payments, towards the augmentation of the incomes of the smaller bishoprics, the first payment in each case to be made *at the end of six months from the day of the avoidance of the see.*

Proviso for deducting from the payment so to be made by any Archbishop of Canterbury or Bishop of London the sums payable by them in respect of certain mortgage debts, for money borrowed, for repairing Lambeth Palace and Addington Place, and rebuilding London House.

11. *Lichfield See Augmentation.*

(Dated 12th July. Gazetted 8th, 11th and 15th August, 1837.)

In order to raise the average annual income of the Bishop of Lichfield to 4500*l.* the fixed annual sum of 850*l.* commencing from 13th August, 1836, to be paid by the Ecclesiastical Commissioners for England, by equal half-yearly payments, on the 13th of February and the 13th of August in every year.

Proviso for postponing a portion of any half-yearly payment, in the event of the fund not being sufficient to answer all the demands upon it.

12. *Chichester See Augmentation.*

(Dated 12th July. Gazetted 18th, 25th and 29th August, and 1st September, 1837.)

In order to raise the average annual income of the Bishops of Chichester to 4200*l.* the fixed annual sum of 650*l.* commencing from the 5th October, 1836, to be paid by the Ecclesiastical Commissioners for England, by equal half-yearly payments, on the 5th of April and the 5th of October in every year.

Proviso as in No. 11.

(c) This provision of the statute is repealed by 1 & 2 Vict. c. 106, s. 103.

13. *Durham Castle Arrangements.*

(Dated 19th July. Gazetted 8th, 15th, and 22nd August, 1837.)

The Bishop of Durham to hold the castle of Durham in trust for the University of Durham, subject to right of access, by the clergy of the diocese, to Bishop Cosin's library within the precincts, and to all right of way to which the same premises are legally subject,—to the right of all such officers of the see or diocese or of the palatinate as have performed for thirty years last past and still perform the duties of their respective offices in any building within the precincts,—and to the enjoyment, by the bedesmen of the cathedral, of the almshouses wherein they reside, until the warden, masters, and scholars shall have provided, to the satisfaction of the bishop, sufficient buildings elsewhere; and as to the officers of the palatinate, so long as any of those duties remain to be performed by officers who held their offices at the time of passing the act for separating the palatine jurisdiction from the bishoprick of Durham.

Certain apartments described, with coach-house and stables, to be reserved for the accommodation of the Bishop of Durham, as Visitor of the University; and to be at all times ready for his use, on three days notice of his wish to occupy them.

The warden, masters, and scholars to maintain and repair all parts within the precincts, and to indemnify the bishop and his successors against repairs and dilapidations.

14. *Salisbury, Gloucester and Bristol, Bath and Wells, and Worcester, Territorial Alterations.*

(Dated 19th July. Gazetted 18th, 25th, and 29th August, and 1st September, 1837.)

The deanries of Cricklade and Malmesbury, in the county and archdeaconry of Wilts and diocese of Salisbury, *with the consent of the Bishop of Gloucester and Bristol* transferred to the diocese of Gloucester and Bristol and the archdeaconry of Bristol.

The deanry of Pottern, in the diocese of Salisbury, transferred from the archdeaconry of Salisbury to that of Wilts.

The parish of Shenington, in the county and archdeaconry of Gloucester and diocese of Gloucester and Bristol, but locally situate between the counties of Warwick and Oxford, and in the deanry of Campden, *with the consent of the respective bishops* transferred therefrom to the diocese and archdeaconry of Worcester and deanry of Kington.

The parish of Icomb, in the county, diocese, and archdeaconry of Worcester, but insulated in the county of Gloucester, *with the like consent* transferred to the diocese of Gloucester and Bristol, the archdeaconry of Gloucester, and the deanry of Stowe.

The parish of Bedminster, in the diocese of Bath and Wells, and in the archdeaconry of Bath and deanry of Redcliffe and Bedminster, *to be transferred, on the first vacancy of the see of Bath and Wells*, to the diocese of Gloucester and Bristol and the archdeaconry and deanry of Bristol.

15. *Lincoln, Oxford, and Gloucester and Bristol Territorial Alterations; and Oxford See present and prospective Augmentation.*

(Dated 19th July. Gazetted 18th, 25th, and 29th August, and 1st September, 1837.)

The parish of Widford, in the diocese of Gloucester and Bristol and archdeaconry of Gloucester, but insulated in the county of Oxford, *with the consent of the respective bishops* transferred to the diocese and archdeaconry of Oxford and deanry of Witney.

The archdeaconry of Berks having been annexed to the diocese of Oxford, with the consent of the Bishop of Oxford (vide No. 1, *antea*), the fixed annual sum of 750*l.*, commencing from the 10th October, 1836, to be paid to him by the Ecclesiastical Commissioners for England during his incumbency of

the see of Oxford, by equal half-yearly payments, on the 10th of April and the 10th of October in every year.

Orders in
Council.

With the consent of the Bishop of Lincoln, already signified, and upon the first avoidance of the see of Oxford, or before such avoidance, with the consent of the Bishop of Oxford, the county and archdeaconry of Buckingham, in the diocese of Lincoln, to be transferred to the diocese of Oxford.

*On the next avoidance of the see of Oxford, in order to raise the average annual income of the bishops thereof to 5,000*l.*, the fixed annual sum of 3,500*l.* to be paid by the Ecclesiastical Commissioners for England by equal half-yearly payments, the first to be made at the end of six calendar months from the day of such avoidance.*

Proviso as in No. 11.

After the archdeaconry of Buckingham shall have become part of the diocese of Oxford the right of appointing the archdeacon to be vested in the Bishop of Oxford.

16. Hereford See Augmentation.

(Dated 21st August. Gazetted 5th, 8th, and 12th September, 1837.)

In order to raise the average annual income of the Bishops of Hereford to 4,200*l.* the fixed annual sum of 1,400*l.*, commencing from 1st September next, to be paid by the Ecclesiastical Commissioners for England, by equal half-yearly payments, on the 1st of March and 1st of September in every year.

Proviso as in No. 11.

17. York, Lincoln, and Peterborough prospective Territorial Alterations; and Peterborough prospective Augmentation.

(Dated 21st August. Gazetted 5th, 8th, and 12th September, 1837.)

With the consent of the Bishop of Lincoln, already signified, and upon the next avoidance of the see of Peterborough, the county and archdeaconry of Leicester, in the diocese of Lincoln, to be transferred therefrom to the diocese of Peterborough, and the right of appointing the Archdeacon of Leicester to be vested in the Bishop of Peterborough.

*And after such avoidance, in order to raise the average annual income of the see of Peterborough to 4,500*l.*, the fixed annual sum of 1,150*l.* to be paid to him by the Ecclesiastical Commissioners for England, by equal half-yearly payments, the first to be made at the end of six calendar months from the day of such avoidance.*

Proviso as in No. 11.

At the time of such avoidance, with the consent of the Archbishops of Canterbury and York, and the Bishop of Lincoln, already signified, the county and archdeaconry of Nottingham, in the province and diocese of York, to be transferred to the province of Canterbury and diocese of Lincoln, and the right of appointing the Archdeacon of Nottingham to be vested in the Bishop of Lincoln.

18. Carlisle and Chester Sees prospective Augmentation.

(Dated 21st August. Gazetted 5th, 8th, and 12th September, 1837.)

In order to raise the average annual income of the Bishops of Carlisle and Chester to 4,500*l.* each, the fixed annual sum of 2,000*l.* to be paid to Bishops of Carlisle, and 1,450*l.* to Bishops of Chester, by the Ecclesiastical Commissioners for England, on the next avoidance of either of the said sees, by equal half-yearly payments, the first to be made at the end of six calendar months from the day of such avoidance in each case.

And if a vacancy should occur in the see of Carlisle before the mortgage debt due from the bishop for money borrowed for repairing Rose Castle should be paid off, then the annual sums payable in respect thereof to be also paid by the Commissioners by like payments, in addition to the sum before mentioned.

Proviso as in No. 11.

19. *Ripon House of Residence.*

(Dated 11th December, 1837. Gazetted 5th, 16th, 19th, and 23d January, 1838.)

For the purpose of providing an episcopal house of residence and demesne for the see of Ripon; part of an estate called Bramley Grange Farm, in the township of North Stainley and parish of Ripon, but belonging to the see of York, transferred, *with the consent of the Archbishop*, to the see of Ripon; and the sum of 1,111*l.* 5*s.* 6*d.* directed to be paid by the Commissioners to the Bishop, for the purchase of Mrs. E. S. Lawrence's leasehold interest therein.

20. *York and Ripon Boundary Line.*

(Dated 1st, and gazetted 16th and 20th February, and 23d March, 1838.)

Such parts of the several parishes of Darton, High Hoyland, Silkstone, Pennistone, and Kirk Hammerton, in the county of York, as are in the diocese and archdeaconry of York, transferred, *with the consent of the Archbishop of York*, to the diocese of Ripon; and as to the said parishes of Darton, High Hoyland, Silkstone, and Pennistone, to the archdeaconry of Craven and deanry of Pontefract; and as to the said parish of Kirk Hammerton, to the archdeaconry of Richmond and deanry of Burrowbridge.

Such parts of the several parishes of Crofton, Warmfield, Normanton, Fetherstone, and Abberford, in the county of York and diocese of Ripon, as form part of the archdeaconry of Craven, transferred, with the like consent, to the diocese and archdeaconry of York and deanry of the Ainsty.

So much of the deanry of Pontefract as remains in the diocese and archdeaconry of York, included in the deanry of the Ainsty; and so much of the deanry of the Ainsty as remains in the diocese of Ripon, included in the deanry of Pontefract.

All parishes and places, churches and chapels, within the limits of the respective dioceses of York and Ripon, made subject to episcopal, archidiaconal, and decanal jurisdiction, according as they are locally situate.

21. *Lincoln See House of Residence; and prospective Augmentation.*

(Dated 4th April, and gazetted 15th, 18th, 22nd, and 25th May, 1838.)

In order to raise the average annual income of the Bishops of Lincoln to 5,000*l.* the fixed annual sum of 1,250*l.* to be paid by the Ecclesiastical Commissioners for England, by equal half-yearly payments, commencing from the next avoidance of the see: with the usual proviso, for postponing a portion of any half-yearly payment in the event of the fund not being sufficient.

Until an episcopal house of residence is provided for the see of Lincoln within the limits of the diocese as newly arranged, the sum of 500*l.* to be paid to the present bishop by the Ecclesiastical Commissioners for England, by half-yearly payments, commencing on the 25th of March, 1839, in order to enable him to procure a temporary residence within such limits: the present house of residence at Buckden to be pulled down and sold, and the proceeds paid to the Commissioners, and applied towards providing a permanent residence.

22. *Exeter See prospective Augmentation—Scilly Islands Jurisdiction.*

(Dated 30th July, and gazetted 24th, 28th, and 31st August, and 4th and 7th September, 1838.)

In order to raise the average annual income of the Bishops of Exeter to 5,000*l.* the fixed annual sum of 3,400*l.* to be paid by the Ecclesiastical Commissioners for England by equal half-yearly payments, commencing from the next avoidance of the see: with the usual proviso, for postponing a portion of any half-yearly payment in the event of the fund not being sufficient.

The Scilly Islands declared to be within the jurisdiction of the Bishop of Exeter and Archdeacon of Cornwall.

23. *Durham Benefices final Augmentation.*Orders in
Council.

(Dated 30th July, and gazetted Aug. 24 and 28, and Sept. 4 and 7, 1838.)

Augmentations of the following poor benefices in the diocese of Durham, which the late William Bishop of Durham had agreed to grant, but which he left uncompleted at the time of his death, to be granted by the Ecclesiastical Commissioners for England; viz. Satley 46*l.*, Medomsley 90*l.*, Trinity Stockton 300*l.*, payable half-yearly on the 22nd of February and 22nd of August in every year, to commence on the 22nd of August, 1838, and the sum of 92*l.* to be paid to the perpetual curate of Satley, being the arrears of the said augmentation from the death of the late Bishop.

24. *St. Asaph and Bangor prospective Union and Charge; St. David's and Llandaff Sees prospective Augmentation; and Manchester Bishoprick prospective Foundation.*

(Dated 12th December, 1838, and gazetted January 25 and 29, and Feb. 5, 1839.)

When either of the Sees of St. Asaph or Bangor shall become vacant the Bishop succeeding thereto is to take it subject to the following condition; viz. that when the other of the said two sees shall become vacant the two sees shall be permanently united, and called the see and diocese of St. Asaph and Bangor, and such bishop become the bishop thereof, and seised of all the property, revenues, advowsons, and patronage belonging to both sees, without payment of first fruits or fees, occupying a seat in the cathedral church both of St. Asaph and of Bangor, and with the same authority over the respective deans and chapters as former bishops: episcopal acts requiring confirmation by the dean and chapter being confirmed by the dean and chapter to whom the right would have belonged if the sees had not been united. On the first avoidance of the see of St. Asaph and Bangor the warrant for the election of a bishop to be issued to the chapter of St. Asaph, and afterwards alternately to the chapter of St. Asaph and that of Bangor.

The Bishop of St. Asaph and Bangor (for the purposes of the act 6 & 7 Will. 4, c. 77, and so as to leave him an average annual income of 5,200*l.*) to pay to the Ecclesiastical Commissioners for England the fixed annual sum of 4,750*l.* by half-yearly payments, the first to be made at the end of six calendar months from the day of such union.

In order to raise the average annual income of the Bishops of St. David's to 4,500*l.* and of the Bishops of Llandaff to 4,200*l.*, the fixed annual sum of 1,600*l.* to be paid to the Bishop of St. David's, and 3,150*l.* to the Bishop of Llandaff, by the Ecclesiastical Commissioners for England, by equal half-yearly payments, commencing from the next avoidance in each case.

Until an episcopal house of residence is provided for the see of Llandaff, the sum of 300*l.* to be paid at the same time as the foregoing sum, in order to enable the bishop to procure a temporary residence.

Usual proviso for postponing a portion of any half-yearly payment in the event of the fund not being sufficient.

The collegiate church of Manchester, on the union of the sees of St. Asaph and Bangor, constituted a cathedral church, and the seat of a bishop, within the province of York. The warden and fellows to be styled dean and canons, and to be the dean and chapter, subject to such future orders and regulations as may be made by competent authority.

The whole county of Lancaster, in the diocese of Chester, excepting the deanry of Furnes and Cartmel, with the consent of the Bishop of Chester, to be constituted the new diocese of Manchester, and the person who shall be duly elected by the said dean and chapter to be the bishop thereof, and invested with all the same rights and privileges as other bishops of England and Wales. Provisions similar to those on the foundation of Ripon.

Upon the foundation of the see of Manchester, the bishop thereof to be endowed with an average annual income of 4,500*l.*; either by transfer of estates from other sees, or partly so, and partly by a payment from the episcopal fund.

25. *York and Ripon; Transfer of an Estate.*

(Dated 4th, and gazetted 12th, 15th, and 27th February, 1839.)

An estate called "Day House Farm," in the parish of Ripon and county of York, belonging to the see of York, to be transferred to the see of Ripon, *with the consent of the Archbishop*, as soon as the interest therein of Mrs. Elizabeth Sophia Lawrence, by virtue of a lease from his Grace, should have been assigned to the Bishop of Ripon, which she had signified her wish to do on the condition of such transfer being made.

26. *Lincoln and Ely; Transfer of Peculiars.*

(Dated 10th, and gazetted 23d and 30th April and 14th May, 1839.)

The parishes of Buckden, Brampton, Spaldwick, Long Stow with Little Catworth, Barham, Easton, and Leighton Bromswold, transferred, *with the consent of the Bishop of Lincoln*, to the diocese of Ely, and included in the Archdeaconry of Huntingdon and Deanry of Leightonstone.

27. *Ripon House of Residence.*

(Dated 11th, and gazetted 19th, 23d, and 26th July, 1839.)

A sum not exceeding 10,000*l.* to be applied by the Commissioners in erecting and completing a residence for the Bishops of Ripon at North Stainley in the parish and diocese of Ripon.

28. *Lincoln House of Residence.*

(Dated 29th January, and gazetted 10th, 21st, and 28th March, 1840.)

The Bishop of Lincoln empowered to purchase an estate called Riseholme, in the county of Lincoln, with a house, offices, and outbuildings thereon; and to sell so much of the estates belonging to the see, let on leases for lives, as, together with the proceeds of the sale of the Palace at Buckden, will be required for completing the said purchase, and putting the said house, offices, and outbuildings, in proper condition for a permanent episcopal residence.

29. *Gloucester and Bristol House of Residence.*

(Dated 3d, and gazetted 21st, 24th, and 28th April, 1840.)

The Bishop of Gloucester and Bristol empowered to purchase an estate called Stapleton, in the county of Gloucester, with a house, offices, and outbuildings thereon; and to sell so much of the estates belonging to the see as, together with the balance in hand of the monies recovered by Robert late Bishop of Bristol for damages done to the episcopal residence at Bristol, and the monies which arose from the sale of the site of the said residence, and accumulations thereon, will be required for completing the said purchase, and putting the said house, offices, and outbuildings, in a proper condition for a permanent episcopal residence.

30. *Canterbury Canonical House of Residence.*

(Dated 8th December, 1840. Gazetted 1st, 5th, 8th and 12th January, 1841.)

The residence house attached to the tenth canonry in Canterbury Cathedral to be appropriated as a residence for the auditor and chapter clerk.

31. *Archdeaconries of London and Middlesex Endowment.*

(Dated 25th January. Gazetted 29th January and 2nd and 9th February, 1841.)

The new canonry in St. Paul's, *prospectively* annexed to the archdeaconry of London, charged with the payment of one third of its income to the Archdeacon of Middlesex; and, *until so annexed*, to be held by the Archdeacon of Middlesex, charged with a like payment to the Archdeacon of London.

32. *Archdeaconry of Northampton Endowment.*

(Dated 25th January. Gazetted 29th January and 2nd and 9th February, 1841.)

The canonry at Peterborough, lately held by the Reverend Joseph Pratt, *prospectively* annexed to the archdeaconry of Northampton.

33. *Lichfield Canonical House of Residence.*

(Dated 25th February. Gazetted 12th March and 6th and 13th April, 1841.)

The residence house attached to the sixth canonry in Lichfield Cathedral appropriated as a residence for the chapter clerk, and the coach-house thereto appropriated to the house belonging to the fifth canonry.

34. *Worcester Canonical House of Residence.*

(Dated 25th February. Gazetted 12th March and 6th and 13th April, 1841.)

A residence house, formerly attached to one of the stalls in Worcester Cathedral, and abutting on the cathedral, directed to be taken down.

35. *Lincoln Episcopal House of Residence.*

(Dated 1st April. Gazetted 9th, 13th and 16th April, 1841.)

A sum of 5000*l.* to be applied by the Commissioners towards erecting and completing a residence for the Bishops of Lincoln.

36. *Ripon Episcopal House of Residence.*

(Dated 1st April. Gazetted 9th, 13th and 16th April, 1841.)

A further sum of 2000*l.* to be applied by the Commissioners towards completing a residence for the Bishops of Ripon.

37. *Rochester Canonical House of Residence.*

(Dated 1st April. Gazetted 9th, 13th, and 16th April, 1841.)

A house of residence, formerly attached to one of the stalls in Rochester Cathedral, to be taken down with a view to the improvement of the precincts.

38. *Maidstone Archdeaconry Foundation and Endowment.*

(Dated 4th June. Gazetted 4th and 22nd June and 6th July, 1841.)

A new archdeaconry founded in the diocese of Canterbury, to be called the Archdeaconry of Maidstone; to consist (subject to future additions) of the deanries of Sittingbourne, Charing, and Sutton; to be in the patronage of the Archbishop of Canterbury, and to be endowed with the canonry in Canterbury Cathedral lately held by the Reverend William Wood.

39. *Nottinghamshire Peculiars.*

(Dated 4th June. Gazetted 8th and 22nd June and 6th July, 1841.)

The deanry and peculiar jurisdiction of Southwell, and the parishes of Kinolton, South Muskham, Apesthorpe, Bole, East Drayton with Askham, Laneham, Misterton, West Stockwith, and North Wheatley, in the county of Nottingham, *with the consent of the two archbishops and the Bishop of Lincoln*, placed under the jurisdiction of the Archbishop of Canterbury, the Bishop of Lincoln, and the Archdeacon of Nottingham.

40. *Gloucester Canonical Substitute.*

(Dated 4th June. Gazetted 8th and 22nd June and 6th July, 1841.)

The dean and chapter of Gloucester empowered to appoint a substitute, to be approved by the bishop, to perform the duties of a canon in residence for such months in each year as shall remain unprovided for after the periods of statutable and customary residence by all the existing canons shall have been fixed.

Payment after the rate of 50*l.* per month to be made by the treasurer of the chapter out of the proceeds of suspended canonries.

41. *Rochester Canonical Substitute.*

(Dated 4th June. Gazetted 8th and 22nd June and 6th July, 1841.)

Same as Gloucester (No. 40), *mutatis mutandis*.

42. *Durham University Endowment.*

(Dated 4th June. Gazetted 8th and 22d June and 6th July, 1841.)

The wardenship prospectively annexed to the deanry of Durham, and the present warden to receive in the meantime 500*l.* per annum.

The professorship of divinity and ecclesiastical history, endowed with the canonry now held by the present professor, subject on the next vacancy to the alteration of the income, in conformity with 3 & 4 Vict. c. 113, or any other act. (See No. 46, *postea*.)

The professorship of Greek and classical literature endowed with the eleventh canonry, recently vacated, subject to a like alteration of the income.

A professorship of mathematics and astronomy founded, and endowed with a stipend of 700*l.* per annum, with a power to the university hereafter to divide it into two professorships, and apportion the stipend. The observatory to be under the management of the professor.

Professors and other officers to perform their duties in person, unless specially licensed to the contrary; in which case a substitute to be appointed by the warden and senate, and paid such portion of the stipend as shall be fixed by them; but subject, as to the amount, to appeal to the visitor by the professor.

Every reader and lecturer in receipt of any emolument to reside in the university, unless relieved therefrom by special licence from the visitor.

A professorship of Hebrew and the other Oriental languages prospectively founded and endowed with 500*l.* per annum.

Eighteen fellowships prospectively founded, in addition to the six already founded; two to be founded on the 29th of September, 1841, and two on that day in every subsequent year until 1849; each to be endowed with 120*l.* per annum.

The warden, masters, and scholars to pay the several stipends, salaries, &c.

Towards providing a fund for this purpose all the estate and interest vested in the Ecclesiastical Commissioners for England by 3 & 4 Vict. c. 113, in the estates formerly assigned to the dean and to the canon of the eleventh canonry (except tithes) to be transferred to the warden, masters, and scholars of the university: and when the necessity for further endowment shall arise, it may be made, either out of any lands, &c. now belonging to any canonries in the said church which may hereafter become vested in the Commissioners, or by payments out of any moneys accruing to them by reason of the suspension of any such canonries.

The order not to affect any statute or regulation of the said university, otherwise than as therein specifically recommended.

43. *Craven Archdeaconry Endowment.*

(Dated 11th August. Gazetted 17th, 20th, 24th, and 31st August, 1841.)

The archdeaconry of Craven in the diocese of Ripon, endowed out of the common funds of the Commissioners, with the annual sum of 180*l.* to be paid to the archdeacon for the time being on the 1st of January, on his producing to the Commissioners a certificate from the bishop that he has duly resided during the preceding year.

44. *Saint Margaret Westminster District Churches Endowment.*

(Dated 11th August. Gazetted 17th, 20th, 24th, and 31st August, 1841.)

One-seventh part of the moneys annually reserved out of the revenues of the canonry at Westminster, held by the Reverend H. H. Milman, for making better spiritual provision for the parish of Saint Margaret, Westminster, to be paid to the minister of a church to be erected in Knightsbridge.

One moiety of the residue to be paid to the minister of a chapel to be erected on the site of the Broadway Chapel, and the remaining moiety to the minister of a church to be erected in the western part of the Westminster division of the parish.

The above several proportions to be paid so soon as districts shall be legally assigned to the said churches, and in the meantime to be paid to the rector, and to be by him paid to licensed curates, within such districts as shall be defined by the bishop in his licences.

45. *Saint John Westminster District Churches Endowment.*

(Dated 11th August. Gazetted 17th, 20th, 24th, and 31st August, 1841.)

The sum of 970*l.* 18*s.* 2*d.*, being the balance in the hands of the Ecclesiastical Commissioners for England of the moneys that accrued during the vacancy of the canonry at Westminster, now held by the Reverend John Jennings, to be applied in building a house for the minister of the district church of Saint Mary's within the parish of Saint John Westminster.

One moiety of the moneys annually reserved out of the revenues of the said canonry, towards making better spiritual provision for the said parish, to be paid to the minister of the said district church of Saint Mary, and the other moiety to the minister of a church about to be erected in the district of Peter Street, so soon as a district shall have been legally assigned thereto, and in the meantime to the rector, and by him paid to a licensed curate, within such district as shall be defined by the bishop in his licence.

46. *Durham ; Charge on the Deanry and Canonries.*

(Dated 11th August. Gazetted 17th, 20th, 24th, and 31st August, 1841.)

All sums which would be payable according to statute or usage to the dean to be divided into seventeen parts, twelve of which are to be paid to the dean and five to the Ecclesiastical Commissioners for England.

All sums so payable to any canon, as respects any canon appointed after the passing of 3 & 4 Vict. c. 113, to be divided into two parts, one to be paid to such canon and the other to the Ecclesiastical Commissioners for England.

The treasurer to deliver an annual account to the Commissioners.

47. *Worcester Canonical Substitute.*

(Dated 11th August. Gazetted 17th, 20th, 24th, and 31st of August, 1841.)

Same as Gloucester (40), *mutatis mutandis*.

48. *Canterbury Canonical Substitute.*

(Dated 14th September. Gazetted 21st, 24th, and 28th September, 1841.)

Same as Gloucester (40), *mutatis mutandis*.

49. *Durham Cathedral Statutes Alteration.*

(Dated 14th September. Gazetted 21st, 24th, and 28th September, 1841.)

Certain alterations in the statutes of Durham Cathedral confirmed.

50. *Newnton and Knoyle Prebend.*

(Dated 14th September. Gazetted 21st, 24th, and 28th September, 1841.)

The sinecure prebend or rectory of North Newnton in the diocese of Salisbury *prospectively* united to the vicarage of North Newnton and the chapelry of Little Knoyle, with a view to the future division of the two parishes.

51. *The Crown and Saint David's Exchange of Advowsons.*

(Dated 14th September. Gazetted 21st, 24th, and 28th September, 1841.)

The patronage of the rectory of Saint Elveis in the county of Pembroke, belonging to the Crown, exchanged for the patronage of perpetual curacy of Saint Ederns in the same county, belonging to the dean and chapter of Saint David's, with the consent of the Lord Chancellor and the chapter of Saint David's.

52. *Benefices Augmentation (a).*

(Dated 6th October. Gazetted 22nd and 26th October, and 2nd November, 1841.)

The incomes of ninety-one benefices mentioned in the schedule having populations above 2000, and being in public patronage, augmented in perpetuity to 150*l.* per annum.

(a) See title *Benefice Augmentation of*.

Orders in
Council.

Payments to be made half-yearly, in May and November, and commencing 1st November, 1841.

53. *Southwell Rectory.*

(Dated 21st October. Gazetted 9th, 13th, 17th, and 20th November, 1841.)

The vicarage of Southwell constituted a rectory, and the incumbent to keep a curate, licensed by the bishop, and receiving such stipend as the bishop shall assign, not exceeding the legal stipend to a curate of a non-resident incumbent.

Out of the revenues accruing to the Ecclesiastical Commissioners for England from the vacated canonries and prebends in the collegiate church of Southwell the annual sum of 300*l.* to be paid to the rector, by half-yearly payments, in May and November; the first to be made on the 1st of November, 1841, on the production of a certificate from the bishop that a curate has been duly employed as aforesaid.

54. *Chester and Ripon Cathedrals.*

(Dated 15th January. Gazetted 1st and 4th February, 1842.)

Certain alterations of the statutes of Ripon Cathedral, prepared by the dean and chapter with the consent of their visitor, and set forth in a schedule, confirmed. Four-fifths of the amount already received by the Commissioners from the dean and one of the canons of Durham, under the Order in Council of 11th August, 1841, to be applied to the repairs of Ripon Cathedral, and the remaining fifth towards a new organ at Chester.

Out of the monies accruing to the Commissioners under the said Order in Council, or any other order for a like purpose, the annual sum of 3000*l.* to be paid to the chapter of Chester, until the year 1854; and the sum of 3,300*l.* to the chapter of Ripon, for ever; in augmentation of their revenues, or a proportional part of such sums respectively, until the monies so to be received by the Commissioners shall be sufficient to pay in full.

The number of minor canons at Chester reduced to four, and the stipends of new minor canons to be raised to 150*l.* each.

The number of minor canons at Ripon to continue to be two, and their stipends to be 150*l.* each.

Two-fifths of the whole chapter revenues in each case, including the aforesaid augmentations, to be applied to the services of the church and the maintenance of the fabric, and the residue to be divided among the dean and canons, so as to give to the dean a double share; subject to all regulations respecting residence.

55. *Durham University Trusts.*

(Dated 2nd February. Gazetted 15th and 29th February, 1842.)

Certain lands, tenements, tithes and hereditaments held by the dean and chapter of Durham under 2 & 3 Will. 4, c. 19, (private), in trust for the university of Durham, transferred with the consent of the chapter and university to the warden, masters and scholars of the university.

56. *Ripon Episcopal House of Residence.*

(Dated 2nd February. Gazetted 15th and 29th February, 1842.)

A further sum, not exceeding 1,500*l.*, appropriated to the final completion of an episcopal residence for the Bishops of Ripon.

57. *Norwich Canonical Substitute.*

(Dated 11th March. Gazetted 29th March, 1842.)

Same as Gloucester (40), *mutatis mutandis*.

58. *Benefices Augmentation (General).*

(Dated 27th April. Gazetted 29th April and 3d May, 1842.)

The thirty-nine benefices mentioned in Schedules A, B and C, to be augmented by the amounts set opposite their names.

The payments to be made half-yearly in May and November, and to commence on the 1st of May next.

Orders in
Council.

Note.—Certain resolutions embodied in this order are printed *ante*, vol. i. page 237i.

59. *Benefices Augmentation (Special.)*

(Dated 27th April. Gazetted 29th April and 3d May, 1842.)

The perpetual curacies of Christ Church, Birmingham; Stowe, otherwise St. Chad, Lichfield; and Wolviston, in the diocese of Durham, augmented.

60. *Claypole Medieties Union.*

(Dated 27th April. Gazetted 6th May, 1842.)

The two medieties of North and South Claypole, in the diocese of Lincoln, united so as to form one benefice.

APPENDIX V.

REDEMPTION OF LAND-TAX

ON

Ecclesiastical Property.

THE Acts and principal sections relating to the Redemption of Land Tax on Ecclesiastical Property, are the following—

42 Geo. 3, c. 116, ss. 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88.

45 Geo. 3, c. 77, s. 1.

46 Geo. 3, c. 133, s. 3.

49 Geo. 3, c. 67, s. 1.

50 Geo. 3, c. 58, s. 2.

53 Geo. 3, c. 123, ss. 26, 27, 28, 29, 30, 31, 38.

c. 142.

54 Geo. 3, c. 173, s. 6.

57 Geo. 3, c. 100, ss. 9, 12, 13, 14, 15, 17.

10 Geo. 4, c. 50, ss. 57, 59, (as to Crown Property).

The remaining Land Tax Acts—2 & 3 Will. 4, c. 127; 3 & 4 Will. 4, c. 95; 4 & 5 Will. 4, c. 60; 6 & 7 Will. 4, c. 80; and 1 & 2 Vict. c. 58—do not affect Ecclesiastical property.

APPENDIX VI.

Residence-Houses of Archbishops and Bishops.

FOR an analysis of the provisions of the following statute, see title *Residence-Houses*, vol. 3. p. 339.

2 & 3 VICT. c. 18.

2 & 3 Vict. c. 18. *An Act to enable Archbishops and Bishops to raise money on Mortgage of their Sees, for the Purpose of building and otherwise providing fit Houses for their Residence.* [1st July, 1839.]

Any Arch-
bishop or
Bishop may
raise Money
on Mortgage
of the Posses-
sions of his
See for re-
building or
improving the
Palace or
Mansion; or
for building a
new Palace or
Mansion for
his Occupa-
tion; or for
purchasing
any Freehold
Mansion-
house, &c.;
or for pur-
chasing Land
for a Site, &c.

"Whereas it is expedient that power should be given to the archbishops and bishops of the several dioceses in England and Wales to raise money upon the security of the lands and hereditaments of their respective sees, for the purpose of taking down and rebuilding, or repairing, adding to, altering, or improving, the palaces or mansion houses, offices, and outbuildings belonging to their respective sees, or of providing other palaces or mansion-houses, offices, and outbuildings for the residence and occupation of themselves and their successors: " Be it therefore enacted, That from and immediately after the passing of this act it shall be lawful for the archbishop or bishop for the time being of any diocese in England or Wales, after procuring such certificate and other evidence and obtaining such consents as are hereinafter required, to borrow and take up at interest in the manner hereinafter mentioned, for the purpose of taking down and rebuilding upon the same or any adjacent site or sites, or upon any other land or ground belonging to his see, or of repairing, adding to, altering or improving any palace or mansion-house, offices, or outbuildings belonging to his see, or any part or parts thereof; or for the purpose of building upon any land or ground belonging to his see any palace or mansion-house, offices or outbuildings, for the residence or occupation of himself and his successors, either in lieu of and in substitution for any palace or mansion-house, offices or outbuildings then belonging to his see, or in addition thereto; or for the purpose of purchasing any freehold messuage or mansion-house, offices, or outbuildings, for the residence or occupation of himself and his successors, either with or without freehold land convenient to be held therewith, and either in lieu of and in substitution for any palace or mansion-house, offices, or outbuildings then belonging to his see, or in addition thereto, and (if necessary or expedient) taking down and rebuilding on the same site, or on any other part or parts of the land to be included in such purchase, or repairing, adding to, altering, or improving the messuage or mansion-house, offices or outbuildings to be so purchased as aforesaid, or any part or parts thereof; or for the purpose of purchasing any freehold land or ground (either with or without any building or buildings thereon) as a site for any palace or mansion-house, offices, or outbuildings, and for occupation therewith, and building on the said land or ground, or any part or parts thereof, any such palace or mansion-house, offices, or outbuildings, for the residence or occupation of himself and his

2 & 3 Vict.
c. 18.

successors, either in lieu of and in substitution for any palace or mansion-house, offices, or outbuildings then belonging to his see, or in addition to the same, and in order thereto taking down and removing, or repairing, adding to, altering, or improving, any building or buildings which may be standing upon the said land or ground at the time of such purchase, or any part or parts thereof, any sum or sums of money not being less than two thousand pounds nor exceeding three years net income and produce of the revenues of his see, such yearly net income and produce to be reckoned on an average of three years, and ascertained and certified in the manner hereinafter mentioned; and as a security for the money so to be borrowed, by indenture or indentures, to be duly sealed and delivered, to demise all or any of the manors, messuages, lands, tenements, tithes, rent-charges in lieu of tithes, rents, and hereditaments of or belonging to his see, to any person or persons or body or bodies politic or corporate, who shall be willing to lend or advance the same, or to such person or persons as such lender or lenders may nominate or appoint, for any term or terms of years, but to be subject to a proviso or provisos in such mortgage or mortgages to be contained for the cesser of every such term or terms of years on payment to the party or parties, body or bodies politic or corporate, who shall advance the same or any part or parts thereof, his, her, or their executors, administrators, successors, or assigns, of the principal sum or sums so to be borrowed, and such interest as shall become due for the same, at the times and in the manner hereinafter mentioned; (that is to say,) the interest thereof, or of so much thereof as from time to time shall remain unpaid, at such rate as shall be agreed upon, to be paid by equal half-yearly payments on the days to be therein appointed, the first of such payments to be appointed to be made at the end of six months next after the date of the mortgage, and one-thirtieth part of the principal money at the end of the third year from such date, and a like thirtieth part of the principal money at the end of each year of the succeeding twenty-nine years; which mortgage or mortgages, when so made, after the same shall have been registered in the registry of the diocese of the archbishop or bishop making the same, shall bind every succeeding archbishop or bishop in the same see, until the principal money, interest, and costs shall be paid off and discharged, as fully and effectually as if such successor had made or executed the same: Provided always, that no messuage, mansion-house, offices, outbuildings, or land shall be purchased under this act by any archbishop, except such messuage, mansion-house, offices, outbuildings, or land shall be situate within the province of such archbishop, nor shall any such messuage, mansion-house, offices or outbuildings be purchased by any bishop under this act, except the same shall be situate within the diocese of such bishop."

How Interest
and Principal
shall be paid.

No Messuage
&c. to be pur-
chased unless
within the
Province or
Diocese.

Sect. 2. "That for determining the amount raisable by any archbishop or bishop under the authority of this act, the net yearly income and produce of the revenues of his see, on an average of three years ending on the twentieth day of September next before the date of the deed or deeds of mortgage shall be ascertained and certified, so far as shall be thought necessary for the purpose aforesaid, by the persons hereinafter mentioned; (that is to say,) in the case of an archbishop by the Archbishops of Canterbury and York for the time being, and in the case of a bishop by such bishop and the archbishop of the province for the time being; and that every such certificate shall be in writing under the respective hands of the certifying parties, and shall be deposited in the registry of the diocese of the archbishop or bishop making such mortgage or mortgages, for the use and benefit of such archbishop or bishop, and his successors, executors, or administrators, and of the person or persons, or body or bodies politic or corporate, by whom the mortgage money shall be advanced, and his or their executors, administrators, successors, and assigns, who shall respectively have a right to inspect the same, and take copies thereof, whenever occasion shall require; and that every such certificate so made and deposited as aforesaid shall for the purposes of the mortgage or mortgages to which the same shall relate be conclusive evidence of the amount of the net yearly income and produce of the revenues of the said see."

How net
yearly In-
come and
Produce of a
See to be
ascertained.

Certificate
thereof to be
deposited in
the Registry
of the Dio-
cese.

2 & 3 Vict.
c. 18.

No Mortgage to be made until a Surveyor's Certificate, stating the Particulars herein required, has been made to certain Parties, and their Consent obtained.

Respecting standing or growing Timber.

Protection for Mortgages.

Mortgagor to covenant to keep down Principal and Interest.

Power of Distress and Sale in case the Principal or Interest shall be Forty Days in arrear.

Limiting Amount of Interest and Principal to be recovered in case of Avoidance of See.

Sect. 3. "Provided always, That no mortgage shall be made under the authority of this act, for any of the purposes aforesaid, until the archbishop or bishop desiring to make the same shall have procured from some skilful and experienced architect or surveyor a certificate containing a statement of the propriety and expediency of raising money for the purposes in question, and of the condition of any palace or mansion-house, offices, or outbuildings, which may be proposed to be taken down and rebuilt, or repaired, added to, altered, or improved, or in substitution for which any palace or mansion-house, offices, or outbuildings shall be proposed to be built or purchased as aforesaid, and of the value of the timber and other materials belonging to the see (if any) available for the purposes aforesaid, or saleable, and a plan and estimate of the works fit and proper to be done for effecting such purposes, and also in the case of a purchase a map or maps under an actual survey of the messuage or mansion-house, offices, or outbuildings, land, and premises proposed to be purchased as aforesaid, and a valuation thereof, and shall have laid the same before the persons hereinafter mentioned, (that is to say,) in the case of an archbishop before the other archbishop and the Lord High Treasurer or First Lord Commissioner of the Treasury for the time being, and in the case of a bishop before the archbishop of the province and the Lord High Treasurer or first Lord Commissioner of the Treasury for the time being, and obtained the consent of the same parties respectively to such mortgage or mortgages as aforesaid, signified by some writing or writings under their respective hands: Provided nevertheless, that if there shall be standing or growing upon any land or ground belonging to the see any timber or other trees or tree which in the judgment of such architect or surveyor ought to be left standing for the ornament or shelter of the palace or mansion-house so proposed to be taken down and rebuilt, or repaired, added to, altered, improved, or substituted as aforesaid, such timber and other trees or tree shall not be deemed timber available for the purposes aforesaid, or saleable, and the value thereof shall not be computed or reckoned by such architect or surveyor in the certificate hereinbefore required to be given by him: Provided always, that such consents so signified as aforesaid shall discharge the person or persons, or body or bodies politic or corporate, by whom the mortgage money shall be advanced, from all obligation and concern to ascertain or inquire whether any such certificate or other evidence shall have been procured and laid before the consenting parties as aforesaid, or for what purpose the mortgage money shall be raised, or whether such purpose shall be within the true intent and meaning of this act."

Sect. 4. "That every such mortgage shall contain a covenant from the archbishop or bishop making the same, for himself, his heirs, executors, and administrators, to pay and keep down so much of the said principal money and interest as shall become payable upon such mortgage or mortgages during the period of his continuance in his said see."

Sect. 5. "Provided always, that whenever the principal money or interest to be secured by any such mortgage or mortgages, or any part thereof respectively, shall be in arrear and unpaid for more than forty days after the same respectively shall become due, it shall be lawful for the mortgagee or mortgagees, his or their executors, administrators, successors, or assigns, to recover the same respectively, or so much thereof respectively as shall be then due, together with interest after the rate reserved by the said mortgage upon any instalment of the principal money which shall be so in arrear, and the costs and charges attending the recovery thereof, by distress and sale in such manner as rents may by law be recovered by landlords from their tenants."

Sect. 6. "Provided always, that from and after every avoidance of any see the lands and hereditaments whereof shall have been mortgaged as aforesaid no person or persons, or body or bodies politic or corporate, to whom any such mortgage or mortgages shall have been made, his, her or their executors, administrators, successors, or assigns, shall be entitled to recover by distress and sale in the manner hereinbefore mentioned any more than one year's interest which may have accrued before such avoidance upon any

principal sum to be secured by such mortgage or mortgages, or more than one instalment for principal money which shall have fallen due before such avoidance."

2 & 3 Vict.
c. 18.

Sect. 7. "That the money to be borrowed as aforesaid shall be paid, in the case of an archbishop, into the hands of such person or persons as shall be nominated or appointed to receive and apply the same for the purposes aforesaid by the archbishops of Canterbury and York for the time being, by some writing under their respective hands, and in the case of a bishop into the hands of such person or persons as shall be nominated or appointed to receive and apply the same for the purposes aforesaid by such bishop and the archbishop of the province for the time being, by some writing under their respective hands after such nominee or nominees shall have given a bond to the persons so nominating or appointing, with sufficient surety in a sufficient sum, with a condition for his or their duly applying and accounting for the money which may come to his or their hands under this act; and the receipt or receipts of the person or persons so to be nominated shall be a sufficient discharge to the person or persons who shall advance and pay the money; and the person or persons so to be nominated shall or may from time to time enter into contracts with proper persons for such works as shall from time to time be approved, in the case of an archbishop, by the archbishops of Canterbury and York for the time being, and in the case of a bishop by the archbishop of the province and the bishop of the diocese for the time being, and be specified in an instrument or instruments upon parchment to be signed by them; and also shall or may, with the like approbation, from time to time rescind or vary any such contracts, and shall inspect and have the care of the execution of such contracts, and shall pay the money for such works, according to the terms of such contracts; or otherwise shall superintend and inspect such works, and pay for the same, as the said two archbishops or the said archbishop and bishop for the time being (as the case may be) shall by some writing or writings under their respective hands appoint or direct; and shall also pay the consideration money for all such messuages, buildings, and lands as shall be purchased under the authority of this act to such persons and in such manner as the said two archbishops or the said archbishop and bishop for the time being (as the case shall be) shall in manner aforesaid appoint or direct; and shall also purchase or provide and pay for all such fixtures and fittings as shall be deemed proper and suitable as aforesaid, and shall be approved by the said two archbishops or the said archbishop and bishop for the time being (as the case may be); and shall pay the costs and charges of any mortgage or mortgages and of any purchase or purchases which may be made under the authority of this act, and of procuring any such certificate, plan, estimate, map, and valuation as aforesaid, and of making copies thereof; and shall take proper receipts for the money to be so paid or applied as aforesaid; and, so soon as the works and other purposes for which such monies shall have been raised shall be completed, and the money paid, shall make out an account of his or their receipts and payments, and enter them in a book fairly written, which shall be signed by him or them, and together with the vouchers for such payments, shall be laid before the said two archbishops or the said archbishop and bishop for the time being (as the case may be), and examined by them, and when allowed by writing under their hands, such allowance to be a full discharge to the person or persons so nominated in respect of the said account: and if any balance shall remain in the hands of such nominee or nominees after the payments aforesaid, and also after making to him or them such compensation for his or their trouble as the said two archbishops or the said archbishop and bishop for the time being (as the case may be) shall think reasonable, the same shall be paid in discharge of the principal debt, secured by such mortgage or mortgages, so far as such balance will extend to pay the same, and so as to reduce proportionably the annual instalments of such debt, or such of the said instalments as shall not have fallen due; all which accounts, when made out, completed and allowed, shall be deposited, together with the vouchers, in the

Money borrowed to be paid into the hands of a Nominee or Nominees.

Powers and Duties of Nominees.

2 & 3 Vict.
c. 18.

The Mort-
gagor may
grant Leases
notwithstand-
ing any such
Mortgage.

The Arch-
bishop or
Bishop for
the Time
being to pay
off yearly at
the end of
the third
Year one
thirtieth Part
of the Prin-
cipal, and
also the In-
terest of such
Part as for
the Time be-
ing may re-
main unpaid;
and to insure
from Fire.

In case of
Neglect to
insure, and
if Fire should
happen,
Power given
for proceed-
ing against
the Arch-
bishop or
Bishop by
Action.

registry of the diocese of the archbishop or bishop by whom such mortgage or mortgages shall have been made, for the use and benefit of such archbishop or bishop and his successors, who shall have a right to inspect the same and take copies thereof whenever occasion shall require."

Sect. 8. "Provided nevertheless, that notwithstanding any such mortgage or mortgages as aforesaid, it shall be lawful for the archbishop or bishop who shall have made the same, and his successors, from time to time to make such contracts and agreements for granting leases, and such leases, either under any existing power, or under any power to be hereafter created, or otherwise howsoever, as he or they might have made in case this act and the said mortgage or mortgages had not been passed or made; and that such mortgage or mortgages shall also be subject to the effect of all such contracts and agreements for leases, and of all such leases, of any of the hereditaments to be included therein, as may have been then already made and may be then subsisting."

Sect. 9. "That every archbishop or bishop making any such mortgage or mortgages as aforesaid, and his successors for the time being, shall and he and they is and are hereby required to pay and discharge yearly at the end of the third year from the making of such mortgage or mortgages respectively, and at the end of each year of the succeeding twenty-nine years, one thirtieth part of the principal money thereby to be respectively secured, until the whole of such money shall be discharged, and also from time to time to pay the interest which shall become due on such principal money, or on such part thereof as for the time being shall remain unpaid; and that every such archbishop or bishop, and his successors for the time being, shall annually, at his and their own expense, from and immediately after the commencement of any such buildings or other works as aforesaid, except as to any palace, mansion house, messuage, or building which shall be proposed to be entirely taken down, and then from and immediately after the commencement of the rebuilding thereof, and also from and immediately after the entering into any contract or contracts for the purchase of any messuage or building under the authority of this act, insure and keep insured the whole of the buildings whereon or on any part whereof such works shall have been so commenced, or which shall be comprised in such contract or contracts as aforesaid, at one or more of the public offices in London or Westminster for insuring houses and buildings from loss or damage by fire, in such sum or sums of money as shall be agreed upon, in the case of an archbishop, by the archbishops of Canterbury and York for the time being, and in the case of a bishop by the archbishop of the province and the bishop of the diocese for the time being; and the receipt or receipts for the premium or premiums which shall be paid for effecting or keeping on foot such insurance or insurances respectively shall be annually exhibited by every such archbishop effecting such insurance or insurances to the other archbishop for the time being, and by every such bishop to the archbishop of the province for the time being; and in every case of any loss or damage by fire to any of the said buildings the money to be received under any such insurance or insurances shall be applied, in the case of an archbishop, by or under the direction of the archbishops of Canterbury and York for the time being, and in the case of a bishop, by or under the direction of the archbishop of the province and the bishop of the diocese for the time being, in or towards the rebuilding or repairing and reinstating of the same."

Sect. 10. "That if any such archbishop or bishop as aforesaid, or any of his successors, shall neglect to insure or keep insured in manner aforesaid the said buildings or any of them to the full amount which shall be agreed upon as aforesaid, and any loss or damage by fire shall happen thereto, and the archbishop or bishop who shall have so neglected, or his heirs, executors, or administrators, shall not within twelve calendar months next after such fire shall have happened rebuild or repair and reinstate the building or buildings which shall have been burnt down or damaged by fire, or apply for the purpose such a sum of money, as together with the money, if any, for which the

building or buildings so burnt down or damaged by fire shall have stood insured, shall make up the full sum for which the same respectively ought to have been kept insured, it shall be lawful, in the case of an archbishop, for the other archbishop for the time being, and in the case of a bishop for the archbishop of the province for the time being, and they are hereby directed, to proceed by action of debt against the archbishop or bishop who shall have so neglected, or his heirs, executors, or administrators, for the recovery of such a sum of money (not exceeding the sum for which the building or building so to be burnt down or damaged by fire ought to have been insured as aforesaid, or the proportion thereof for which the same shall not have stood insured, after deducting therefrom the money, if any, which such archbishop or bishop, his heirs, executors, or administrators, shall have applied towards such rebuilding or repairs and reinstatement as aforesaid) as shall be sufficient to rebuild or repair and reinstate the same; and the money so to be recovered in such action shall be applied, in the case of an archbishop, by the archbishops of Canterbury and York for the time being, and in the case of a bishop by the archbishop of the province and the bishop of the diocese for the time being, or under their direction respectively, in or towards rebuilding, repairing, and reinstating the building or buildings which shall have been so burnt down or damaged by fire as aforesaid."

2 & 3 Vict.
c. 18.

Sect. 11. "That upon every vacancy which shall happen of any see the lands and hereditaments whereof shall have been mortgaged under the authority of this act, before such mortgage or mortgages shall be discharged, the archbishop or bishop for the time being avoiding the same, his heirs, executors, or administrators, shall pay so much of the half-yearly payment of interest upon the principal money secured by any such mortgage or mortgages accruing and not actually accrued due at the time of his ceasing to be archbishop or bishop of the said see as shall be in proportion to the time which at such avoidance shall have elapsed of the current half year, and shall also (in case such avoidance shall happen after the expiration of the second year from the date of such mortgage or mortgages respectively) pay so much of the annual instalment which shall fall due next after such avoidance of the said see of every principal sum so to be secured as aforesaid as shall be in proportion to the time which at such avoidance shall have elapsed of the current year."

A Proportion of the half-yearly Interest, and of the annual Instalment of Principal, to be paid on Avoidance of the See.

Sect. 12. "That if any money shall be raised by any archbishop or bishop under the authority of this act, for the purpose of building or purchasing any palace or mansion house, offices, or outbuildings, in substitution for any palace or mansion house, offices, or outbuildings then belonging to his see, it shall be lawful for any such archbishop, with the consent of the other archbishop for the time being, and for any such bishop, with the consent of the archbishop of the province for the time being (such consent to be signified by some writing under the hand of the consenting party), to take down and remove the palace or mansion house, offices, or outbuildings for which the said palace or mansion house, offices, or outbuildings to be so built or purchased shall be substituted as aforesaid (if the same or any part thereof cannot be better applied for the permanent advantage of the see), and to apply the materials in or towards any buildings or other works for the purpose of which such money shall be raised as aforesaid, or to sell the same: Provided nevertheless, that all monies to arise by any such sale shall be paid to the person or persons who shall be nominated and appointed as aforesaid to receive the money so to be raised by mortgage; and that the receipt or receipts of such nominee or nominees shall be a sufficient discharge or sufficient discharges to the person or persons paying the same; and that such monies shall be applied by such nominee or nominees, in the first place, for all or any of the purposes for which the mortgage money shall be raised, with such approbation and in such manner and subject to such provisions as hereinbefore is directed and are contained with respect to the money to be raised by any such mortgage or mortgages as aforesaid."

For Removal of Buildings, and applying the Materials to the Purposes of the Act.

2 & 3 Vict.
c. 18.

Dilapidation
Monies to be
applied for
Purposes of
the Act.

Mortgagees
not bound to
inquire as to
Application
of previous
Sums.

Governors of
Queen Anne's
Bounty may
advance any
Sums autho-
rized to be
raised by this
Act.

For appoint-
ing new No-
minees in
certain Cases.

Power to
purchase
House or
Land for a
Site to build
on.

Sect. 13. "That all sums of money recovered or received for dilapidations, by suit, composition, or otherwise, from any former archbishop or bishop, or his representatives, and which shall not have been laid out or expended in rebuilding or repairs, shall be paid to the person or persons who shall be nominated or appointed as aforesaid to receive the money so to be raised by mortgage; and the receipt or receipts of such nominee or nominees shall be a sufficient discharge or sufficient discharges to the person or persons paying the same monies; and such monies shall be applied by such nominee or nominees, in the first place, for such purposes and in such manner and subject to such provisions as are hereinbefore directed and contained with respect to the money to be raised by any such mortgage or mortgages as aforesaid: Provided always, that no person or persons, or body or bodies politic or corporate, who may advance money upon such mortgage or mortgages as aforesaid, shall be bound to inquire or ascertain whether the monies which may have been recovered or received for dilapidations from any former archbishop or bishop, or his representatives, shall have been previously laid out or expended or paid as aforesaid."

Sect. 14. "That it shall be lawful for the governors of the Bounty of Queen Anne for the augmentation of the maintenance of the poor clergy to advance and lend, at one or more time or times, out of the money which has arisen or shall from time to time arise from that bounty, or from grants by parliament in aid thereof, any sum or sums of money by this act authorized to be raised; and such mortgage or mortgages as aforesaid shall be made for repayment in manner aforesaid by instalments of the principal sum or sums so to be advanced, with four pounds *per centum per annum* interest for the same respectively, by such half-yearly payments as aforesaid."

Sect. 15. "That if, at any time or times before all the purposes for which any person or persons may have been appointed nominee or nominees under the provisions of this act shall have been carried into execution, such person or persons, or any nominee or nominees who may have been appointed under this present power, shall die, or decline or become incapable to act, or desire to be discharged from acting in the execution of the purposes for which he or they may have been so appointed, or shall misconduct himself or themselves in the opinion of the two archbishops or the archbishop and bishop (as the case may be) by whom he or they shall have been nominated, or their successors for the time being, then and so often as the same shall happen it shall be lawful for the said two archbishops or the said archbishop and bishop for the time being (as the case may be), by any writing under their hands, to nominate or appoint any other person or persons in the stead or place of the nominee or nominees who shall so die, or decline or become incapable to act, or desire to be discharged, or misconduct himself or themselves as aforesaid; and such person or persons so to be nominated or appointed as last aforesaid, upon giving a bond to the persons so nominating and appointing him or them as aforesaid, with sufficient surety, in a sufficient sum, conditioned for his or their duly applying and accounting for any money which may come to his or their hands under this act, shall and may act or concur in acting in the execution of the purposes of such appointment, with such and the same powers, and in such and the same manner, as if he or they had originally been a nominee or nominees for the purposes aforesaid."

Sect. 16. "That it shall be lawful for any archbishop, with the consent of the other archbishop and the lord high treasurer or first lord commissioner of the treasury for the time being, and for any bishop, with the consent of the archbishop of the province and the lord high treasurer or first lord commissioner of the treasury for the time being, such consents to be signified by some writing or writings under the respective hands of the consenting parties, and also by their respectively being made parties to and executing the deed or deeds by which the purchased property shall be conveyed as hereinafter mentioned, to contract for the absolute purchase of any freehold messuage or mansion house, offices, or outbuildings, or for the absolute purchase of the

fee of any copyhold messuage or mansion house, offices, or outbuildings, for the residence or occupation of himself and his successors, either with or without land convenient to be held therewith, and also to contract for the absolute purchase of any freehold land, or of the fee of any copyhold land, either with or without any building or buildings thereon, as a site for a palace or mansion house, offices, or outbuildings, for the residence or occupation of himself and his successors, and for occupation therewith; which said premises so to be purchased shall be conveyed and assured unto and to the use of such archbishop or bishop and his successors in the same see, and be for ever thereafter held and enjoyed by him and them respectively, and be and continue annexed to the said see as part of the possessions thereof."

2 & 3 Vict.
c. 18.

Sect. 17. "That it shall be lawful for all bodies politic, corporate, or collegiate, corporations aggregate or sole, tenants for life or in tail, husbands, guardians, trustees, and feoffees in trust, committees, executors, and administrators, and all other persons and trustees whomsoever, not only for and on behalf of themselves, their heirs and successors, but also for and on behalf of their cestuisque trusts, whether infants, issue unborn, lunatics, idiots, femmes covert, or other person or persons, and to and for all femmes covert who are or shall be seised, possessed of, or interested in any messuages or buildings, lands, grounds or hereditaments which may be conveniently used or taken for the purposes of this act, to contract for, sell, and convey, or, if copyhold, to enfranchise the same and every part thereof, unto such archbishop or bishop as aforesaid and his successors; and all such contracts, agreements, sales, conveyances, and assurances shall be valid and effectual in the law to all intents and purposes whatsoever, any law, statute, usage, or custom to the contrary in anywise notwithstanding; and all bodies politic, corporate, or collegiate, and all persons whomsoever, so conveying as aforesaid, are hereby indemnified for or in respect of any such sale which he, she, or they, or any of them, shall respectively make by virtue or in pursuance of this act."

Persons
under legal
Disability
empowered
to sell.

Sect. 18. "That if any money shall be agreed to be paid for any messuages or buildings, grounds, lands, or hereditaments, purchased by virtue of the powers of this act for the purposes thereof, which shall belong to any corporation, trustee, feme covert, infant, lunatic, person or persons under any disability or incapacity as hereinbefore is mentioned, such money shall, in case the same shall amount to or exceed the sum of two hundred pounds, with all convenient speed be paid into the Bank of England in the name and with the privity of the accountant general of the Court of Exchequer, to be placed to his account *ex parte* the archbishop or bishop of the diocese for whose residence any such messuages, buildings, grounds, lands, and hereditaments shall have been purchased, pursuant to the method prescribed by an act passed in the first year of the reign of his majesty King George the Fourth, intituled 'An Act for the better securing Monies and Effects paid into the Court of Exchequer at Westminster on account of the Suitors of the said Court, and for the Appointment of an Accountant General and two Masters of the said Court, and for other Purposes,' and the general orders of the said court, and without fee or reward; to the intent that such money shall be applied, under the direction and with the approbation of the said court, to be signified by an order made upon a petition to be preferred in a summary way by the person or persons who would have been entitled to the rents and profits of the said messuages and buildings, grounds, lands, and hereditaments, in the purchase of the land tax, or towards the discharge of any debt or debts, or such other incumbrance, or part thereof, as the said court shall authorize to be paid, affecting the same messuages or buildings, grounds, lands, or hereditaments, or affecting other lands and hereditaments standing settled therewith to the same or the like uses, intents, and purposes; or where such money shall not be so applied, then the same shall be laid out and invested, under the like direction or approbation of the said court, in the purchase of other lands, tenements, or hereditaments, which shall be conveyed to, for, or upon such and the like uses, intents and purposes, and in the same

Application
of Purchase
Money when
it exceeds
200*l*.

1 Geo. 4,
c. 35.

2 & 3 Vict.
c. 18.

manner, as the messuages or buildings, grounds, lands, and hereditaments, which shall be so purchased, stood settled or limited, or such of them as at the time of making such conveyance and settlement shall be existing undetermined and capable of taking effect; and in the meantime and until such purchase shall be made the same money shall, by order of the said court upon application thereto, be invested by the said accountant general in his name in the purchase of three *per cent.* consolidated or reduced bank annuities; and in the meantime, and until the said bank annuities shall be ordered by the said court to be sold for the purpose aforesaid, the dividends and annual produce thereof shall from time to time be paid, by the order of the said court, to the person or persons who would for the time being have been entitled to the rents and profits of the said lands and hereditaments so hereby directed to be purchased in case such purchase or settlement were made."

When less
than 2000*l.*
but exceed-
ing 20*l.*

Sect. 19. "That if any money so agreed to be paid for any messuages or buildings, grounds, lands, or hereditaments purchased for the purposes aforesaid, and belonging to any corporation, or to any person or persons under disability or incapacity as aforesaid, shall be less than the sum of two hundred pounds, and shall exceed the sum of twenty pounds, the same shall be paid to three trustees to be nominated by the person or persons for the time being entitled to the rents and profits of the messuages, buildings, grounds, lands, and hereditaments so purchased, and approved of by the archbishop or bishop for whose residence such messuages, buildings, grounds, lands, and hereditaments shall have been purchased, such nomination to be signified by some writing under the hands of the nominating and approving parties, in order that such principal money, and the dividends arising thereon, may be applied in manner hereinbefore directed, so far as the case may be applicable, without obtaining or being required to obtain the direction or approbation of the said Court of Exchequer."

When not
exceeding
20*l.*

Sect. 20. "That where such money so agreed to be paid for any such purchase as aforesaid shall not exceed the sum of twenty pounds, then and in all such cases the same shall be paid to the person or persons who would for the time being have been entitled to the rents and profits of the messuages and buildings, grounds, lands, or hereditaments so purchased, or in case of infancy, coverture, idiotcy, lunacy, or other incapacity, then to his, her, or their respective guardian or guardians, husband or husbands, committee or committees, trustee or trustees."

Certificate of
Cashier, and
Receipts of
Guardians,
&c. to be
good Dis-
charges.

Sect. 21. "That the certificate of the cashier of the Bank of England who shall receive any such purchase money as is hereinbefore directed to be paid into the Court of Exchequer shall be a sufficient discharge for the purchase money therein certified to be received; and that the receipt in writing of such respective guardian or guardians, husbands or husband, committees or committee, trustees or trustee, for any such purchase money as is hereinbefore directed or authorized to be paid to them or him respectively, shall be a sufficient discharge for the purchase money therein acknowledged to be received."

NOTE.—*This Act has been repealed by the following Statute of 5 Vict., but as it still governs all transactions that have occurred under its provisions it has been inserted in this place.*

5 VICT. (a)

An Act to alter and amend the Law relating to Ecclesiastical Houses of Residence. [1842.]

“ WHEREAS it is expedient to alter and amend the law relating to ecclesiastical houses of residence, be it enacted, &c. That whenever it shall appear to be expedient to relieve any bishop, having more episcopal houses of residence than one, from any of such houses; or to provide any bishop with a more convenient house of residence; or to add to, alter, improve, or take down and rebuild any episcopal house of residence, or to improve the demesnes thereof; it shall be lawful, by the authority provided in an act passed in the session of parliament held in the sixth and seventh years of the reign of his late majesty, intituled, ‘ An Act for carrying into effect the Reports of the Commissioners appointed to consider the State of the Established Church in England and Wales, with reference to Ecclesiastical Duties and Revenues, so far as they relate to Episcopal Dioceses, Revenues, and Patronage,’ with the consent, under the hand and episcopal seal of the bishop, to make such arrangements as may by such authority be deemed most expedient, for selling and conveying to such person or body corporate, and for such consideration as may be approved by the like authority, any episcopal house of residence then belonging to the see of such bishop, or for taking down the same or any part thereof, and selling the site or the materials thereof (as the circumstances may render expedient); or for adding to, altering, improving, or taking down and rebuilding any episcopal house of residence; or for improving the demesnes adjoining to any such house by the purchase of any land, tenement, or hereditament in the immediate neighbourhood or within the view thereof; or for building a new episcopal house of residence for any see on any site to be approved by the like authority; and for applying the proceeds of any such sale as aforesaid, or any part thereof, to any of such purposes, or to any such other purposes, and in such manner as shall appear to be most conducive to the permanent benefit of the see; and that so much of the said act as relates to the providing of any bishop with a more suitable and convenient residence, shall be extended so as to include and apply to any of the purposes of this act.”

Episcopal House may in certain cases be taken down and sold, or may be rebuilt or altered.

6 & 7 Will. 4, c. 77.

Provisions of 6 & 7 Will. 4, c. 77, s. 1, made applicable thereto.

Sect. 2. “ That in any scheme which shall be laid before her majesty in council by the Ecclesiastical Commissioners for England under this act, recommending any arrangement for taking down or selling any episcopal residence, or changing the site thereof, the said commissioners shall set forth particularly the grounds and reasons upon which they deem it expedient to offer such recommendation.”

Commissioners to state their Reasons for the Alteration.

Sect. 3. “ That an act passed in the session of parliament held in the second and third years of her majesty’s reign, intituled, ‘ An Act to enable Archbishops and Bishops to raise Money on Mortgage of their Sees for the purpose of Building and otherwise providing fit Houses for their Residence,’ shall be repealed: Provided that nothing herein contained shall affect any subsisting mortgage made under the provisions thereof; but that every such mortgage, and all proceedings completed and in progress in respect thereof, shall be as valid and effectual, and all the parties to such mortgage or to any such proceeding shall continue subject to the same conditions and provisions, as if the said act had not been repealed.”

Repeal of 2 & 3 Vict. c. 18, except as to subsisting Mortgages.

Sect. 4. “ That in case such a deficiency shall have been or would be created in the average annual income of any bishop appointed after the passing of the first-recited act, by the effecting of any mortgage or other arrangement under either of the said acts or this act, as to reduce it below the average annual income of such bishop named in the first-recited act, or in any order of her majesty in council, issued under the provisions thereof, it shall be lawful, by the authority aforesaid, out of any monies from time to time stand-

Deficiency in Bishop’s Income may be supplied.

(a) This bill had passed both Houses Royal Assent, when the Editor was of Parliament, but had not received the obliged to send it to press.

5 Vict.

Chapters,
Deans and
Canons may
purchase and
alter, take
down or re-
build.

Provisions of
3 & 4 Vict.
c. 113, s. 59,
made applica-
ble thereto.

Episcopal
House may
be made the
Deanery or a
Canonical
House.

Provisions
respecting
disposal of
Canonical
Houses,
4 & 5 Vict.
c. 39, s. 18,
amended.

Purposes of
this Act to be
within Pro-
visions of
3 & 4 Vict.
c. 113, s. 68.

Articles in
House sold
or taken down
may be sold,
or removed to
other House.

ing to the credit and account of the Ecclesiastical Commissioners for England, being part of payments from the larger sees respectively towards the augmentation of the incomes of the bishops of the smaller sees, if it shall be deemed fit, and if such monies, after duly considering all the claims thereon, shall appear to be sufficient for such purpose, to make any arrangement for supplying or preventing such deficiency, or any part thereof, which by the like authority shall be deemed expedient."

Sect. 5. "That it shall be lawful for the dean and chapter, or for the dean, or for any canon of any cathedral church, under the authority aforesaid, to purchase any episcopal house of residence sold under the provisions of this act, or the site of any such house, or any other house or site, being contiguous or near to such cathedral church, or any part of such house or site, and to add to, alter or improve any such house or to take down the same, and to build another house or more houses than one upon the site thereof, or to apply the site of any such house, or any part thereof, by and with the authority aforesaid, to the improvement of the cathedral, or the precincts thereof; and that so much of an act passed in the session of parliament held in the third and fourth years of her majesty's reign, intituled, 'An Act to carry into effect, with certain Modifications, the Fourth Report of the Commissioners of Ecclesiastical Duties and Revenues,' as relates to the raising of monies by any dean or canon for the purpose of building, enlarging or otherwise improving the residence house of his deanery or canonry, shall be extended so as to make lawful the raising of monies, in the manner and with the authority therein provided, by any dean and chapter, dean or canon, for any purpose of this act."

Sect. 6. "That any house so purchased by the dean and chapter, dean or canon, of any cathedral church, or any house erected upon any site so purchased, may, by the authority aforesaid, and with the consent of the dean and chapter, be made the deanery, or the house of residence for any canon of such church; and the house theretofore occupied as the deanery, or any house no longer required as the house of residence of any canon, may be so applied or disposed of, as may by the same authority and with the like consent be determined on."

Sect. 7. "That the provisions of an act passed in the session of parliament held in the fourth and fifth years of her majesty's reign, intituled, 'An Act to explain and amend two several Acts relating to the Ecclesiastical Commissioners for England,' respecting the disposal of houses no longer required by any canon, do and shall apply to all such houses, whether there may have been any exchange of such houses or not."

Sect. 8. "That the provisions of the thirdly-recited act, relating to the sale and application of any sum of money invested in trust for any ecclesiastical body corporate, do and shall include and apply to all monies and securities for money, and to all stock in the government funds or elsewhere, standing in the name of the accountant-general of the Court of Chancery, or in the name or names of any other public officer, or of any individual or individuals for or to the credit or for the benefit of or in trust for any bishop, dean and chapter, dean or canon, whether for the purpose of being laid out in land or otherwise; and that the same provisions, and also the provisions of the same act, relating to the sale, transfer or exchange of any lands or other hereditaments belonging to any bishop or chapter shall extend and may be applied to any of the purposes of this act."

Sect. 9. "That whenever any house of residence to be sold or taken down as aforesaid shall contain any pictures, books or other goods and chattels belonging to the owner of such house in right of his dignity, and not in his private capacity, directions shall be given by the authority aforesaid for the sale of such fixtures and articles of furniture as shall be deemed to be unfit for removal to the new or other house of residence, and for the application of the money arising from such sale, to purposes consistent, as nearly as may be, with the source from whence the money shall have arisen, and also for the removal to such new or other house of residence of all such pictures and

books, and of all such other fixtures, goods and chattels as shall be deemed to be fit for removal thereto, and for the deposit and care of them thereat, in conformity, as nearly as may be, with the uses to which they were previously applicable respectively."

5 Vict.

Sect. 10. "That in every case of a house of residence purchased, built, rebuilt, added to, altered or improved under the authority of the first-recited act or of this act, or the provisions of the secondly-recited act, all fixtures, fittings and other articles in such house which shall have been or shall be paid for out of any monies provided or raised under such authority or such provisions, and which shall be set forth in an inventory in writing, certified under the common seal of the said commissioners, and registered in the registry of the diocese, shall be deemed to be, to all intents and for all purposes, as much part and parcel of the freehold of such house of residence as any fixtures can in any case now by law be held to be part and parcel of the freehold."

Certain Articles to be deemed Freehold Fixtures.

Sect. 11. "That it shall be lawful, by the authority aforesaid, to direct, that any house of residence purchased, built, rebuilt, added to, altered or improved under the provisions of the said recited acts, or either of them, or of this act, shall be insured and kept insured by the bishop, dean or canon for the time being in the occupation thereof, at his own personal charge and expense, in such public office or offices of assurance from loss or damage by fire, and in such sum or sums as by the like authority may be deemed fit, and such house shall be insured and kept insured accordingly; and that the receipt for every premium payable for any such insurance shall be delivered to the said commissioners within fourteen days after such premium shall become due; and that in case of loss or damage by fire to any such house so insured, it shall be lawful, by the like authority, to direct in what manner the money received under any such insurance shall be deposited in trust, to be applied towards the rebuilding or repairing and the reinstating of such house, or of any such part thereof as may have so suffered loss or damage; and also to direct in what manner the same money, and the interest and accumulations thereof, if any, shall be applied to such last-mentioned purposes."

Residence Houses to be insured.

Sect. 12. "That it shall be lawful for any corporation, aggregate or sole, tenant for life or in tail, guardian, committee or trustee, on behalf of their or his successors, heirs, remaindermen, issue in tail, infants, lunatics and cestui que trusts respectively, and for any feme covert, to contract for, sell and convey any lands, tenements or hereditaments, or if copyhold to enfranchise the same, for any of the purposes of the first and thirdly recited acts or this act; and that if the purchase money shall amount to or exceed the sum of two hundred pounds, the same shall be paid, without fee or reward, into the Bank of England, in the name and with the privity of the accountant-general of the Court of Chancery, to be placed to his account *ex parte* the bishop, dean and chapter, dean or canon, as the case may be, to whom or for whose benefit any such lands, tenements or hereditaments shall have been so sold and conveyed or enfranchised, to the intent that such money shall be applied, under the direction of the said court, by order made upon the summary petition of the corporation or person entitled to the rents and profits of the said lands, tenements or hereditaments, in the purchase of the land tax, or towards the discharge of any debt or debts, or other incumbrance or any part thereof, affecting the same lands, tenements or hereditaments, or affecting other lands, tenements or hereditaments standing settled therewith to the same or the like uses, intents and purposes; or where such money shall not be so applied, then the same shall be laid out and invested, under the like direction, in the purchase of other lands, tenements or hereditaments, to be conveyed to, for, or upon such and the like uses, intents and purposes, and in the same manner as the lands, tenements or hereditaments so sold, conveyed or enfranchised stood settled or limited, or such of them as shall be then existing undetermined and capable of taking effect; and in the meantime and until such purchase shall be made, the same money shall, by like order, be invested by the said accountant-general in his name in the purchase of three pounds

Corporations, and Persons under legal Disability empowered to sell.

Application of Purchase Money where it exceeds 200*l*.

5 Vict.	per centum consolidated or reduced Bank annuities; and in the meantime and until the said Bank annuities shall be ordered by the said court to be sold for any purpose aforesaid, the dividends and annual produce thereof shall, by like order, be from time to time paid to such corporation or person; and that any such purchase money which shall be less than the sum of two hundred pounds, and shall exceed the sum of twenty pounds, shall be paid to three trustees, to be nominated in an instrument in writing duly executed by such corporation or person, and approved by the said commissioners under their common seal; in order that such principal money, and the dividends accruing thereon, may be applied in manner hereinbefore directed, so far as may be, without the direction or approbation of the said court; and that any such purchase money which shall not exceed the sum of twenty pounds shall be paid to such corporation or person; and the certificate of the cashier of the Bank of England shall be a sufficient discharge for any such purchase money as aforesaid therein certified to be received; and in case of infancy or other incapacity, the receipt in writing of any guardian, husband, committee or trustee, as the case may be, for any such purchase money, shall be a sufficient discharge for the amount therein acknowledged to be received."
Where less than 200 <i>l.</i> , but exceeding 20 <i>l.</i>	
When not exceeding 20 <i>l.</i>	
Certificate of Cashier, and Receipts of Guardians, &c. to be good Discharges.	
Restriction as to mortgaging certain augmented Benefices.	Sect. 13. "That the powers for enabling incumbents of benefices to raise money by way of mortgage for the purpose of building or improving their houses of residence shall not be exercised by the incumbent of any benefice augmented under the provisions of the thirdly-recited act, without the consent of the said commissioners, signified under their common seal."
Powers of 3 & 4 Vict. c. 113, extended to this Act.	Sect. 14. "That all the powers and authorities vested in her Majesty in council and in the said commissioners by the thirdly-recited act, with reference to the matters therein contained, and all other the provisions of the same act relating to schemes and orders prepared, made and issued for the purposes thereof, shall be continued and extended and apply to her Majesty in council and to the said commissioners, and to all schemes and orders prepared, made and issued by them respectively, with reference to all matters contained in this act, as fully and effectually as if the said powers, authorities and other provisions were repeated herein."
Act may be amended this Session.	Sect. 15. "That this act may be amended or repealed by any act to be passed in the present session of parliament."

APPENDIX VII.

Form of Injunctions

ISSUED BY THE VISITOR AT THE VISITATION
OF HIS CATHEDRAL (a).

INJUNCTIONS made and given the 22nd day of February in the year of our Lord God 1841, by us, Edward, by God's Providence Lord Archbishop of York, Primate of England and Metropolitan; unto the Dean, Chapter and Canons of our Cathedral and Metropolitan Church of Saint Peter in York.

IMPRIMIS—We ordain and enjoin that the holy communion be celebrated in the cathedral and metropolitan church of York on all the great festivals of the church for which proper prefaces are appointed, and on every Sunday, in compliance with the directions set forth in the rubrics of the Book of Common Prayer.

2.

Item—The dean is head of the chapter, but we ordain and enjoin that he has no power of his own mere authority to exercise any paramount or exclusive jurisdiction over the other residentiary members of the chapter, or to declare any such residentiary to be deprived of his functions, or to direct any such residentiary to be excluded from ingress into the nave or any other part of the cathedral.

3.

Item—The dean is in virtue of his office president of the chapter whensoever he shall be present at a chapter duly convened and capitularly congregated, but he is nevertheless only *primus inter pares*, and in all such capitular meetings he has only one vote, and the decision of the majority is binding upon the whole corporate body.

4.

Item—Whether the dean be present or not [provided the deanery be full] when the chapter is duly convened and capitularly congregated, the decision of the majority is binding upon the whole corporate body.

5.

Item—That it is competent to a chapter duly convened and capitularly congregated to order the corporate seal to be affixed to leases or any other grants of corporation property without the concurrence of the dean.

(a) See title *Deans and Chapters*, exhibited at a cathedral visitation.—
vol. ii. p. 92, for the form of Articles Ed.

Form of
Injunctions.

6.

Item—That the dean's individual concurrence is not essential to the validity of any capitular act, except the act be a judicial one; such, for instance, as the confirmation of a bishop's lease.

7.

Item—That the chapter seal shall not be affixed to any deed or instrument whatsoever, except in the actual presence of three members of the chapter.

8.

Item—That all acts to which the chapter seal shall be affixed, shall be delivered to the chapter clerk for registration, and be duly registered by him in the muniment book of the chapter.

9.

Item—That in conformity with the ancient statutes in this case made and provided, there shall be always three locks and three keys to the chest in which the chapter seal is kept, one key to be in the custody of the dean when present, and the two others respectively in the custody of two of the canons residentiary; and we ordain and enjoin that the three keys aforesaid shall never be in the custody of the dean alone or of any one residentiary canon, but that the said three keys shall always be in the custody of three several persons, and that during the absence of the dean, or of either of the said residentiary canons, their keys shall be deposited with the chapter clerk to be transferred to any other of the canons according to his seniority, not having the custody of another key.

10.

Item—The dean may, if he think fit, give his proxy to any residentiary canon of the chapter during his necessary absence from his duties in York.

11.

Item—That the senior canon in residence has only one vote in any meeting of chapter which may be duly convened and capitularly congregated during the absence of the dean.

12.

Item—That, except in cases of emergency, three days previous notice shall be given for all meetings of the chapter.

13.

Item—That all notices for the meeting of chapters shall issue through the chapter clerk, at the requisition of the dean, or, in the absence of the dean, of the canon in residence; but if the dean or the canon in residence, as the case may happen, shall refuse to cause a chapter to be summoned when applied to for that purpose, a chapter may be convened at the requisition of any two residentiary canons, such requisition having been previously lodged in the registry of the dean and chapter.

14.

Item—That quarterly meetings of the chapter shall be holden on the first Wednesday in January, April, July, and October, in every year, at which meetings only, or at meetings adjourned therefrom, all agreements and contracts respecting rents or fines, sales, purchases, alienations, exchange or commutations pertaining to the property of the dean and chapter, and of the fabric respectively, shall be discussed, considered and determined.

15.

Item—All orders for expenditure exceeding 20*l.*, and all orders for the payment of bills, shall issue from the quarterly chapters, provided for in the last injunction, or at adjournments from such quarterly meetings, or from chapters to which all the residentiary members of the chapter, and all canons, who in the sense and meaning of the statute of Henry the Eighth, may happen to be in York (*etiam non residentiarii qui tunc in civitate nostrá Eboram adesse contigerit*), shall have been summoned at three days' notice, which notice shall set forth the expenditure or payments proposed to be made, and the other business to be transacted at such meeting of the chapter.

16.

Item—The chapter clerk shall collect half-yearly, viz. in the commencement of June and December, all outstanding accounts, and present them for examination previous to the audit to two members of the chapter, appointed for that purpose at a previous meeting of the chapter, and such accounts shall be submitted for a final audit to the chapter at their fixed quarterly meetings next ensuing.

17.

Item—No monies shall be received by the dean, or any other members of the chapter, on account of the dean and chapter, but all such payments shall be made to the chapter clerk, who, in virtue of his office, is authorized to give legal discharges for the same.

18.

Item—No appointments of minor canons, songmen, choristers, or other persons officially in the cathedral, or in the school under the superintendence of the dean and chapter, shall be made except at chapters duly convened and capitularly congregated, at which not less than three members of the corporate body shall be present.

19.

Item—Whereas irregularities seem to have grown up in the chapter with respect to residence, which irregularities have been suffered to pass without either notice or objection till the fit and proper time for the investigation of them has gone by, we ordain and enjoin that henceforth and for the future each residentiary shall keep residence for the space of three calendar months in each year, unless he be prevented from so doing by sickness or any urgent cause.

20.

Item—That provided any residentiary be prevented from attending divine service in the cathedral for several days during the time of his residence by sickness, or by any other urgent cause, in such case it may be lawful for him to provide a proxy out of the residentiaries or canons of the said cathedral to attend divine service in his stead.

21.

Item—That in the event of any residentiary being prevented from keeping or completing his residence in the residence house, by sickness or any urgent cause, the same shall be notified to a chapter duly convened and capitularly congregated, and if the cause of absence be substantiated, and a proxy out of the residentiaries or canons be appointed to keep or complete a residence in the stead of the residentiary thus prevented, the same shall be sanctioned and approved of by the chapter and duly entered in their muniment book.

22.

Item—That in the event of any residentiary failing to complete his residence, and to provide himself with a proxy out of the residentiaries or canons of the cathedral, such residentiary shall not be entitled to the profits, perquisites, or emoluments accruing from his place and office for the year in which he has so failed to reside or to complete his residence, but such profits, perquisites and emoluments shall be paid to the treasurer of St. Peter's for the benefit of the fabric fund of the cathedral, such forfeiture however not to accrue in cases of necessity approved of by the archbishop.

23.

Item—We ordain and enjoin that the dean shall keep residence in the new deanery house, and that henceforth and for the future such new deanery house shall be deemed and taken to be the house of the dean for all purposes of residence.

24.

Item—We ordain and enjoin that the dean shall protest his residence every year in the same manner as the other residentiaries, and shall observe and complete the same during the period for which he has so protested.

Form of
Injunctions.

25.

Item—That when the dean is in residence, one of the residentiaries shall always reside at the same time.

26.

Item—That all the residentiaries, except the dean, shall successively and separately keep residence in the new residentiary house, which we ordain and enjoin shall henceforth and for the future be deemed and taken to be the house of all residentiary canons respectively for all purposes of residence.

27.

Item—That in observance of ancient usage one of the vicars choral shall be appointed to fill the office of librarian of the chapter library, and that such appointment shall always be made at a chapter meeting duly convened and capitularly congregated, at which not less than three members of the corporate body shall be present.

28.

Item—That no appropriation of the funds belonging to the chapter library shall be made except at a chapter meeting duly convened and capitularly congregated, at which meeting not less than three members of the corporate body shall be present.

29.

Item—That rules and regulations for the due management and augmentation of the chapter library, and for such an extensive use of the books as may be consistent with their safe custody and careful preservation, shall be drawn up at a chapter meeting duly convened and capitularly congregated, at which not less than three members of the corporate body shall be present, and that such rules and regulations shall be inscribed in the muniment book of the chapter.

30.

Lastly—We enjoin and order that you register or cause to be registered truly and faithfully these our injunctions in your registry.

IN WITNESS of all and singular the premises, we have hereunto set our hand and archiepiscopal seal the day and year above written.

E. EBOR.

These Injunctions, as well as the Articles, vol. ii. p. 92, were for the most part carefully modelled upon precedents of former visitations of the cathedral of York by the archbishops of that province, and of St. Paul's by the bishops of London.

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